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THE LAW OF FIXTURES IN BRITISH INDIA

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PREFACE.

The adherents of historical materialism, in limiting themselves to economic facts as the fundamental cause of law, certainly deserved the reproach of having accepted too narrow a viewpoint for their judgment of jural phenomena. They have indeed failed to take any account of the social facts, other than economic, in their possibility of direct and dominant influence on the formation of law. They have not sufficiently enquired into the possible causal relations of the higher varieties of social facts and have also failed to give proper place to the sentiments and psychic activities which are attributable to the collective struggles, to inter-individual inhibitions, to sympathy and the social sentiment. Yet historic materialism furnishes the most correct explanation yet advanced of the variations of law; and if this truth is already established by numerous demonstrations, the law of fixtures when traced through different ages and for different countries will certainly add facts that would reveal the same thing indubitably. Changes in the prevailing economic conditions necessarily involve corresponding alterations in the law, and the history of the law of fixtures really furnishes us with clear and definite demonstration of the fact.

The method by which the law has grown is more akin to an unconscious process rather than a voluntary, reasoned and consciously selected development. The function of human reason in the midst of other phenomena indeed seems to have an autonomy which is at least highly limited, if not actually fictitious.

The Second, Third, Fourth, Fifth, Sixth and Seventh chapters contain matters treated in an original way, and though the train of scientific thought upon which they are founded is not altogether new, I have endeavoured to follow it out to novel consequences. In doing this I have felt many difficulties, and it must be confessed that but for the light thrown upon those obscurities by various earlier writers and cases decided on those points, the difficulties might prove insurmountable. I have indicated the extent of my indebtedness to them in their proper places.

The enquiry no doubt is limited to the law of Fixtures in British India. The dearth of direct judicial authority on the probable questions, however, precludes a final answer from that source, and it has therefore been necessary to approach the problems from the historical standpoint and to study actual rather than judicial precedents.

Single-handed as I have worked, there must be many blunders, both of omission and commission, and for all these I am alone responsible. Yet if the skeleton that I have presented succeeds in exciting the slightest inquisitiveness in others for the life-history of the institution, I shall consider my efforts as not utterly fruitless, to dust return though they might.

THE LAW OF FIXTURE IN BRITISH INDIA.

INTRODUCTION.

Gaius, while beginning his history of the Roman law, characterised as monstrous, the taking up of "the subject-matter to be expounded at once with unwashed hands", disregarding the beginning and omitting the historical causes. It is indeed difficult to understand the real nature of anything unless we know when and how it was born. The true nature of things lies in their genesis. "It is" says Vico, "nothing but their *birth* in certain times and in certain forms". Our present institutions did not come to us in a day but are the result and expression of the accumulated experience of ages. Consequently we cannot ignore the history of any institution we desire to understand. History, indeed, in recalling the past to our memory furnishes our mind with new matter. The memories of past events place before us in abundant variety the co-operation of the most different agencies, and the concurrence of the most diverging phenomena, thus supplementing our rarer opportunities for individual observation with the added experience hoarded up through ages of generations and through cycles of periods. History no doubt furnishes facts and this itself is of much consequence to an enquirer. But that is not its only function. By means of history we can discover in the things of the past, the explanation of the present, and of every circumstance lying beyond it.

But "such is the unity of all history that any one

who endeavours to tell a piece of it must feel that his first sentence tears a seamless web".1 This seamless web of the history of our subject unites us inseparably to various other matters. Our main interest must naturally centre on deciphering the pattern which lies directly before us. But "in tracing the warp and woof of its structure" we are brought inevitably into a larger field of vision.

Though 'the first sentence' that shall be told would tear the fabric, the space would only allow us to begin with a discussion of the *objects of rights*. Ordinarily the objects of rights in legal transactions consist primarily of simple or individual things. They are regarded by law as units, notwithstanding that they may consist, physically, of more or less numerous parts. Simple or individual things in the legal sense exist not only where the organic processes of nature create distinctive individual things, as animals, but also wherever a thing in the commercial sense exists. Accordingly, utensils, clothings, things in bulk and parcels of land are treated by law as simple things.

The component parts of simple things are not themselves things in a legal sense, but merely parts of a thing. Law does not look upon them as existing by themselves, rather, they constitute, with the principal thing an actual, economic, and legal whole. By division, however, individual things can become several,—parts of things can become independent things. Similarly, by combination independent things may become mere parts.

Medieval law, indeed, recognized in various cases,

1 Maitland—"A prologue to the Hist. of Eng. Law."

independent rights in the component parts of a thing. The examples afforded by the Medieval law, however, show that this was only due to a confusion of the two conceptions of *component parts* and *accessories.* 1 Huebner in his "History of the Germanic Private Law" has collected these examples:— (A) Buildings might stand in the ownership of a person other than the owner of the land. Huebner points out that this principle was doubtless an echo of those primitive conditions in which houses that were not yet firmly attached to the soil were regarded as chattels, and consequently did not constitute *component parts* of the land. 2 The learned historian cites several other instances and points out that all these were cases of, what we may call, the *apparent component parts.*

(B) The next class of examples cited by Huebner is the "Story' or Roomage" ownership in medieval German towns. 3. The medieval law also attributed to the products of the soil a separate legal existence ; 4, often treating them even before their severance as chattels.

The modern Germanic law has sharply distinguished the conception of the component part from related legal institutes, and recognizes as a component part, "that which can exist without alteration of its nature only in union with another definite thing, and finds in this its indispensable support and preservation." The component part is therefore, according to the modern view, absolutely subject to the legal fortunes of the whole. It therefore merges in the principal thing and loses its individuality. It has no longer as

1. Huebner—History of Germanic Private Law, page 27
2. Ibid.
3. Hist. of Germanic Private Law, page 174
4. Ibid 175 e. g. trees grains, fruits.

such a legal status and has only the legal quality of the whole. The accessories or appurtenances, however, retain their independent quality as things. They stand to the so-called principal thing in a relation by virtue of which the legal fortunes of the latter also influence them. The accessory quality of a thing depends upon its appointed economic purpose, which is to augment the utility of the other thing with which it is connected.

It is needless to point out that the conception of appurtenance is of much consequence to us as students of the law of fixtures. A sharply defined conception was indeed lacking in the old systems.

In the Germanic system, however, accessories played from the very earliest times an important role.1 The most important appurtenance-relations were those in which *Chattels were appurtenant to land.* In the case of rural lands these included all objects that served the management of the estate. In the case of buildings the old sources laid greatest stress upon the close connection into which chattels were brought with the house. 2

No distinction was made between component parts and appurtenants. But it was necessary that the objects thus firmly affixed should be intended to serve the economic ends of the principal thing, and not merely for the use of the temporary possessor.

Chattels appurtenant to chattels also occur in the

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1. See Huebner—page 156
2. An oft-repeated maxim was that "all should belong to the house that was earth-wall-rivet or nail fast." See Huebner—page 177

old Germanic law. Besides, in the old system, lands too could be treated as appurtenant to other lands.1

Whatever that be, the law of Fixtures is evolved out of the complexity that arose out of the annexation of a movable or chattel with the immovable or real property, the merger, so to say, of a lesser interest with the greater, of the inferior right in what the Romans called 'things' with the superior, or the fusion of, what the English Jurists call accessory and the principal. Therefore it presupposes a society in which the conception of property both in movable and immovable are already developed. Thus it is not known in the days what are styled by the poets as 'Golden age' or it is not in existence in a state, which is classed by Russeau as 'State of Nature.'

To the Romans everything was '*res nullius*' in the beginning and it was only by "*occupatio*" that this '*res nullius*' gradually grew to be the property of the occupier. According to Maine "Occupancy was the process by which 'no man's goods' of the primitive world became the private property of individual in the world of History."2 Then again this '*res nullius*' had its origin in the theistic doctrine that was in force among the early Romans. As a matter of fact in all early institutions of law and society, we see that religion and law were welded together, so much so, that one was often deemed to be dependent upon the other. The primitive man no doubt ascribed everything to God and held everything he saw around the universe to be the gift of God. And though societies developed, ideas changed

1. Huebner—page 178.
2. Maine's Ancient Law, page 251.

and theories were built in accordance with the needs and environments in later days, the primitive conception of godly gifts in the property remained for a considerable time quite unchanged. "The earth" says Blackstone, "and all things therein were the general property of mankind from the immediate gift of the creator, * * * and by the law of nature and reason, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession contained for the same time only that the act of possession lasted."1 It is significant that the idea of a permanent right did not at once creep in. The land was abundant and wants were few and people then were more or less of a migratory nature. The natural law of demand and supply applied and the latter being far in excess of the former, there was no necessity for individual permanent acquisition or appropriation. But as population increased, it became necessary to entertain conception of a more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. "In the beginning of things," says Maine, "Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual." 2. Thus the ownership of property though originally based on possession or occupation merely, gradually came to imply the idea of exclusive possession as against the whole world and such exclusive possession for a long period ripened the rights of ownership, so much so, that

1. Blackstone—2nd Book, chapter 1.
2. Maine's Ancient Law, page 253.

the great German Jurist Savigny gave a very cryptic idea of the origin of property. "All property" says Savigny, "is founded on adverse possession ripened by prescription." This aphorism of Savigny, however terse it may sound, had a far-reaching consequence in as much as two new conceptions, viz (1) adverse possession and (2) prescription came to be recognised as natural modes of acquiring property.

Thus gradually from the rudimentary ideas of occasional use and temporary possession grew the whole structure of the modern conception of property when Austin defined it as "a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". 1

The definition of property as given in the New York code 2 is in this connection significant. There it is said that "the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others; the thing of which there may be ownership is called property." This definition in its turn is based on the Roman notion of *dominium* or *proprietas*, which in the civil law was nothing more than the aggregate of rights that constituted ownership. "Dominium id est proprietas" says Naratius. 3 Thus it is conceded by all Jurists that the theory of property is based on two pre-requisites, namely (1) ownership and (2) thing. Or in otherwords it presupposes an object and secondly a control over it.

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(1) Austin's Jurisprudence, Page-217.

(2) Vide New York Code.

(3) Vide De acquirendo rerum Domino D. 41 ; 1—13.

Dr. Holland thus defines ownership as" a plenary control over an object."1

When we turn to the Hindu Dharmashastras we find that the same principle is underlying the theory of property. Jimutbahan defines it as the absolute use of a thing according to the pleasure of the owner. 2 The great Hindu sages displayed a good deal of logical acumen in discussing the relationship between the conceptions of ownership and property. They analysed the subject from two different standpoints, namely that of person, स्वामित्व, and that of thing, स्वत्व, and came to the conclusion that the ownership and property might be regarded as mutually interdependent correlatives connoting two different aspects of the same identical relation. The property as understood in the modern legal phraseology was classed by them as an additional one, अतिरिक्त पदार्थः, as it did not fall within the category of the objects enumerated by the Vaisheshika School :—

द्रव्यगुणस्तथा कर्म्म सामान्यं सविशेषकं ।
समवायस्तथाभावः पदार्थाः सप्तकीर्त्तिताः ॥ ३

But apart from those logical niceties it is clear that to the Hindus, property implied ownership of a thing and so it may perhaps be said without any fear of contradiction that the Hindu theory of property was similar to the theories of the Western Jurists.

As has already been said the early conception of the acquisition of property began with what we may call the ' occupatio ' theory. It is indeed conceivable

1. Holland's Jurisprudence.
2. Vide Mandlik's Vyavahar Mayukha, page 31, Note 1.
3. Karikabali, l. 2.

that at the earliest stage this 'occupatio' need not have been of 'res nullius.' There really might have been a stage when it was not possible for one to complain 'ममस्वमनेनापहृतम' because the occupation would make it the property of the 'अपहर्त्ता.' It is evident that no law of fixtures could have been thought of at such a stage. When, however, property rights have gained such recognition as to make it impossible for any one to acquire property by mere occupation in materials already recognised as another's property, when 'occupatio' or occupation is limited to only res nullius,—when 'परिग्रह' is limited to 'अपूर्वस्वामिक' things, then only the question of fixture may arise.

There was another mode of acquisition recognised by the early Roman Jurisconsults and adopted by the modern Jurists and that was by the 'accessio' or the theory of accession. It means and includes the acquisition of property of another by accession or acquiring the rights of ownership in the property originally vested in another by some act of the latter, which may again be subdivided into two heads, namely (1) by the act of God and (2) by the act of man. Thus the acquisition of property by alluvion and diluvion, as well as the finding of hidden treasure, the owner of which is unknown are regarded as the acts of God. There is another mode of acquisition of property by 'accession,' which is not attributed to any act of God but is essentially the act of man and the law of fixtures forms part of that mode of acquisition by accession. The theory underlying the law of fixtures, bereft of all legal subtleties, is the annexation, or attachment, permanent in character of a movable with an immovable property by which the movable loses its character as movable and is merged with the immovable and thereby forms part of the latter.

Thus where a tenant annexes or more correctly attaches something permanently to the soil leased out to him by his landlord, or where the lessee of a building makes an extension of it, or constructs a window or some such thing for more convenient use, or when he adds something to the building for decoration which in its turn forms part of the original building, or where he annexes some machinery to the building or to the soil leased out to him, and that annexation is in pursuit of his trade, questions at once arise as to who would be the owner of the annexation or attachment, and as to whether the tenant would be allowed to remove the annexation on the expiry of his lease; or whether it would go to the landlord or his heir or reversioner or remainder man on its demise. As a matter of fact the whole law of fixtures is based on the two following fundamental problems arising out of the complications referred to above, namely :—(1) whether the particular article is a fixture or not, and (2) whether the particular fixture can be lawfully removed by the person annexing it to the freehold, and in that case if such person is liable for waste.

We see how the law of fixtures is evolved out of the complications arising out of combination of a movable with an immovable property; and though the development of it is comparatively recent, the origin of it is traceable to very early times, so much so, that we find traces of the law of fixture in the legal institutions of the Romans, the Hindus and the Mahomedans. The law discussed therein was chiefly in relation to what is now called 'agricultural fixture', and it is needless to say that with the growth of commerce and trade, the law is extended to what is now called trade or domestic fixtures. It is remarkable, however, that the principles enunciated in the

early institutions of the Romans, the Hindus and the Mahomedans are strikingly similar, and even the modern law is almost the same, subject of course to certain legislative enactments and changes. The modern English law of fixture is based on two principles, namely :—(1) Quickquid plantatur solo solo cedit,—whatever is annexed to the land forms part of the land and (2) whatever once becomes part of the freehold cannot be severed after by a limited owner or temporary occupier e.g. tenant for life or for years without the commission of waste. The second rule is of course much modified now by the enactment of "The Agricultural Holdings Act" ; but the first remains till to-day almost unchanged. Let us see how far these principles were recognised by the ancient Jurists of the world. To begin with, the Romans, in their anxieties for settling disputes between the parties, laid down the following law which is still recognised as the authoritative principle embodying the law of fixtures. Thus in the Institutes of Justinian, we find the following :—

(*a*) " If a man builds upon his ground with the materials of another, he is considered as the proprietor of the building, because everything built upon the soil accedes to it."

(*b*) " On the contrary if any one builds with his own materials on the ground of another, the building becomes the property of him to whom the ground belongs."

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1. Gaius ii 73 ; D XI i. 1.7.10.
Quia omne Quod iaodificature solo cedit.

2. D XI i. 1.7.12.
Ex Diverso, Si qui in alieno Solo Sua materia domum aedificaverit, illius fit domus cujas et solum est.

(c) "If Titius places another man's plant in the ground belonging to himself, the plant will belong to Titius : on the contrary if Titius places his own plant in the ground of Maevius, the plant will belong to Maevius—that is if in either case, the plant has taken root ; for before it has taken root, it remains the property of its former owner. But from the time it has taken root, the property in it is changed ; so much so, that if the tree of a neighbour presses so closely on the ground of Titius as to take root in it, we pronounce that the tree becomes the property of Titius. For reason does not permit, that a tree should be considered the property of any one else than of him in whose ground it has taken root and therefore, if a tree planted near a boundary, extends its roots into the lands of a neighbour, it becomes common." 1.

(d) "As plants rooted in the earth accedes to the soil, so, in the same way, grains of wheat which have been sown are considered to accede to the soil. But as he, who has built on the ground of another, may according to what we have said, defend himself by an exception of *dolus malus*, if the proprietor of the ground claims the building ; so also he may protect himself by the aid of the same exception, who at his own expense and acting bonafide, has sown on another man's land." 2.

In the Dharmasastras of the Hindus we find that the same process is at work to evolve out the conceptions of ownership and property, and we find moreover that the principles enunciated by them

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1. Gains II 74 ; XII, 1. 7. 13.
2. Gains II 75, 76 ; D XII 1. 9. 13 ; Vide also Institutes, of Justinian, by Sanders, pages 183 to 186

with regard to the law of fixtures have traits of similarity with the law laid down by the Romans on the subject. Thus the Hindus started with a conception which is similar to the notion of occupatio They however advanced a step further, and in their law books we find constant recognition of what is called limited ownership. "This earth "says Jagannath" is the cow which grants every wish ; she affords property of a hundred various kinds (inferior, if the owner need the assent of another proprietor—superior, if his right precede assent) ; while she deludes a hundred owners, like a deceiving harlot, with the illusion of false enjoyment ; for in truth, there is no other lord of this earth but one, the supreme lord." We see that this illustration at once gives an idea of the Hindu theory of absolute and limited ownership and may very well be compared to the similar ideas promulgated by the early Roman Jurists.

There are several means of acquisition of property recognised by the Dharmasastras, some of which are still accepted as the natural modes of acquiring property. Gautama, the earliest known Sutrakara, says 'स्वामिऋत्विक्‌थ क्रयस'विभाग परिग्रहाधिपमेषु'. According to Manu there are seven virtuous means of acquisition of wealth, namely :—inheritance, gain, purchase, conquest, application of wealth, employment of work and acceptance of gifts from proper persons.

'समविद्यागमा धर्म्यादायोलाभः क्रयोजयः ।
प्रयोगः कर्म्मयोगश्च सत्प्रतिग्रह एव च ॥' 1.

Dr. Sen says that of the seven modes of acquisition of property enumerated above, the Prayoga (प्रयोग) or application of already existing property is some-

1. Manu X 115.

what similar to the 'accessio' theory of the Romans, and the questions discussed therein resemble the questions relating to the law of fixtures. 1 Dr. Sen seems to have ignored the text of Gautama altogether and has really twisted the meaning of Prayoga very much to fit in with the Roman accessio. It is however, not at all necessary to go to this *Prayoga* for *accessio.* Gautama's 'अधिगम' is almost on all fours with the Roman *accessio.* The text of Gautama cited above means "A man becomes owner by inheritance, purchase, partition, *Seizure* or finding" and herein both the 'occupatio' and 'accessio' can easily be discovered.

The conception of 'accessio' is not wanting in Manu. It is easily discoverable in his saying

"येऽ क्षेत्रिणो बीजवन्त: परक्षेत्र प्रवापिण: ।
ते वै शस्यस्य जातस्य न लभन्ते फलं क्वचित् ॥"

by which Manu means to say that as between the person to whom the field belongs and another who sows his seeds in it, the crops belong to the former in the absence of a special contract under which both may become shares in the produce, and this proposition may very well be compared to the maxim "quicquid plantatur solo solo cedit" which is still accepted in England as the law relating to fixtures. Then again the question regarding the right of a person building a house upon the land of another with his own materials was discussed by Narada, and the proposition of law laid down by him have striking resemblance to the law of the

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1. Manu IX 49.
1. Vide Hindu Jurisprudence by Dr. Pryanath Sen pages 57—63.

present day. Thus Narada says :—

परभूमौ गृहं कृत्वा ष्टोमं दत्त्वा वसेत्तु यः ।
स तदगृहीत्वा निर्गच्छेत् तृणकाष्ठानि चेष्टकाम् ॥ 1

* * *

स्तोमादिना वसित्वा तु परभूमावनिश्चितः ।
निर्गच्छं स्तृणकाष्ठादि न गृह्णीयात् कथञ्चन ॥
यान्येव तृणकाष्ठानि त्विष्टकादिनि वोसिताः ।
विनिर्गच्छंस्तु तत् सर्व्वं भूमिस्वामिनि वेदयेत् 2

(a) He who dwells in a house, which he built on the ground of another man, and for which he pays rent, shall take with him, when he leaves it, the thatch, the wood and the bricks.

But if he live without paying rent on the ground of another without the owner's assent he shall, by no means, when he quits it, take away the thatch and the timber.

(b) The grass, wood and bricks which are thus moved, belong to him who leaves the ground provided he paid rent for the spot and not otherwise. 3

In this connection the following comment is made in the Vivada Ratnakar, namely :—"In the former texts it had been mentioned that in one case he may take them, in the other he may not take them. That distinction is grounded on property and on the want of property. These, therefore, are now explained in this text."

It is significant that while the principle laid down by Manu coincides with the Roman and English

1. Vide Parasara madhaba ; Bibliotheca Indica —Parasara Smriti, Vol III page 236 ; see also Vivada Ratnakara, page 168.
2. Vide Bibliotheca Indica—Parasara Smriti Vol III page 236.
3. Colebrook, Vol II page 398.

principles there is a note of divergence in the text of Narada. The courts of India following the text of Narada have held that the English law of Fixtures does not apply in India. In the Full Bench case of Thakur Chandra Pramanik 1, Sir Barnes Pacock, C. J. after discussing the text of Narada as well as the Mahamedan Law on the subject as laid down in the Hedayah, held that the English Law of Fixtures had no application in India even in ancient days. And the same view was adopted by Mr. Justice Bhashyam Iyengar and Sir Ashutosh Mukherjee in two later decisions reported in 27 Madras 211 and 14 C. W.N. 952 respectively. It is significant however that in all those case the text of the Manu was not referred to. Had the said text of Manu been brought to the notice of those eminent Judges, it is difficult to forecast as to what their conclusions would have been. It may be noted here that in the text of Manu there is no mention of the tenant ; but there is a general description of the person sowing in the land of another, while Narada makes a distinction between the tenant who pays and who does not pay rent. Or in other words as has been pointed out in the Vivada Ratnakar, the text of Narada is to reconcile and explain the position taken up by Manu and other writers, and the whole distinction is grounded on property and no property. Dr. Priyanath Sen in his Hindu Jurisprudence compares the text of Manu with the English Law of Fixture, and while commenting on the text of Narada, says that "at any rate these provisions are less severe than those of the English Law which by a somewhat stringent application of the maxim "quicquid

1. 6 W. R. 228.

plantatur solo solo cedit" allow the land owner to sweep off everything that is attached to his land." 1

On referring to the ancient Mahamedan texts we find also the same coincidence of ideas underlying the principles of Fixtures. Thus in the Hedayah it is laid down that if a lessee of an unoccupied land hires it for the purpose of building or planting, he is entitled on the expiry of his lease to remove the trees or houses planted or built by him. If, however, the proprietor of the soil wants to have them, he must get the consent of the owner of the houses or trees and the owner consenting must pay him an equivalent. 2

We thus see that there is a close similarity in the thoughts of the different ancient schools referred to above, regarding the principles of removability of Fixtures. Comparing these principles with the principles underlying the English law of Fixtures, we are tempted to think that with regard to the removability of Fixtures, the English School is more reactionary in as much as there irremovability of Fixtures has been recognised as a general rule, and although a large mass of exceptions allowing removal has grown out in recent times, yet the general principle of irremovability of Fixtures is still regarded as the established law of England.

The Indian legislature, however, has never taken such a narrow view of the subject, and it appears that lest there be any misconception about the true intention of the legislature, section 108 of the Transfer of Property Act has been imported into the Statute Book,

1. Hindu Jurisprudence by Dr. P. N. Sen pp. 57 and 63
2. Vide Hamilton's Translation of Hedayah Vol III pages 284 ; 325.

which gives the lessee wide powers of removal of his fixtures during the continuance of his lease. It is for these reasons, we think, that the courts in India have always eloquently held that the English law of Fixtures has got at the most a very limited application in India. It seems to us that the main consideration which actuated the Courts in India to consistently uphold this view is the general disability imposed by the common law of England on the tenant to remove his 'fixture' whereas the general law in India does not impose any such disability.1

We have already noticed that in all early institutions as well as in modern schools of law, the question of Fixture arose first in connection with what is now commonly called "Agricultural Fixture" and then with the advancement of trade and commerce and with the simultaneous increase of wealth, questions of Fixtures have been extended to cases of trade and domestic and ornamental use. The law of Fixture specially in India is still in its making, but it may be said, having regard to the rapid change and vast progress that is evinced in the different branches of trade and commerce, that the law of Fixtures in India is a growing institution and is in the process of growing and capable of developing, so much so that it would not be too much to expect that a day will soon come when a more elaborate and systematic law of Fixtures will have to be introduced in our Statute Books.

Questions of Fixtures arise principally between the landlord and tenant, mortgagor and mortgagee, lessor and lessee and in connection with their different

1. Vide in this connection the remarks of Mr. Sarada Charan Mitter in his Land Laws of Bengal. 1st. Edn. page 402 (Tagore Law Lectures 1896).

transactions, namely mortgage, pledge, sale, lease, hire purchase system. In the following pages we shall attempt to discuss the questions arising thereto in detail.

We have indicated in the foregoing pages the principal lines of resemblance and difference between the Indian and the English Law of Fixtures. Although the Indian Law on the subject is evolved out of the processes entirely different from those at work in England, it cannot be denied that by virtue of the close contact between the two systems, the Indian growth of the institution must have very much been influenced by the English principles and a study of the Indian development of the institutions cannot altogether ignore its growth in the English system.

CHAPTER I.

The General Principles of the English Law of Fixtures.

Fixture defined :—

An eminent English Professor has described 'Fixture' as follows :—

"A Fixture is an article which by its annexation to the land has lost its chattel nature and has become in the eye of the law, part and parcel of the realty ; and although a person, by virtue of his right of removal, may be entitled to severe the article from the land and restore it to its original nature as a chattel, nevertheless, until severance, the article remains a fixture and a constituent part of the freehold." 1.

It is remarkable that the word 'Fixture' has received no exact legal definition as has been pointed out in the case of Wiltshear V. Cottrell. 2 It is used by different writers to convey different meanings. According to some the word "Fixture" connotes no further idea than the simple fact of annexation to the freehold 3 whereas according to others the term applies "to things", which by their annexation to land and so long as they are so annexed, have lost their character as personal chattels and become part and

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1. Vide The Law relating to Fixtures—By Adkin and Bowen—Introduction XXXVII.

2. (1853) 1 E and B 674.

3. See Amos and Ferard's Treatise on the law of Fixtures page 1.

parcel of, and subject to the incidents and rights of property attaching to the land to which they are so annexed".1

The name of fixture is also sometimes used in its Etymological sense to denote a thing annexed to land and by its so annexation, it cannot be legally removed because it becomes a fixture. There is, however, another sense in which the term fixture is very frequently used as denoting those personal chattels which have been annexed to land, and which may be afterwards severed and removed by the party annexing them or his personal representatives against the will of the owner of the freehold. 2

A careful analysis of the different and apparently conflicting theories of Fixtures leads us to the irresistible conclusion that they mark only the different stages of evolution to which the term Fixtures, in its legal sense has gone into. It is admitted on all hands that the first rule of law with regard to Fixtures is expressed by the maxim "Quick quid plantatur solo solo cedit"—whatever is affixed to the freehold becomes a part of it. It follows that by the said annexation it is subjected to the same rights of property as the land itself. Therefore it originated in a society in which the distinction between the personal chattels and land was clearly marked out. Further it originated in a society in which the superiority of land as compared to chattels was unequivocally recognised. Originally no doubt the distinction between land and chattels was based on their physical differences. Land is permanent in its nature, immovable and indestructible whereas chattels may always be removed and

1. Co-Litt 53a ; Amos and Ferard on Fixtures, 3rd Edn. page 1.

2. Amos and Ferard's Fixtures, page 2.

destroyed. It is clear that from the beginning land was held in greater importance than the chattels. The importance was further augmented in the Feudal Age, when land was regarded as the property of the king, as such to the people at large it was only an object of tenure. Legislation was set on foot to formulate laws for the preservation and enjoyment of the land by respective parties ; enactments and changes of law were made from time to time to suit the changed circumstances and environments, but the basic principle underlying those laws was for the recognition of the superiority of land over chattels and the early law was therefore always in favour of the landlords. In the Feudal Age although the lands were nominally vested in the king, they were in their turn distributed to the tenants-in-chief, who held them in feesimple and because really the masters of the situation. The fee-simple was not in ancient times divided into a multiplicity of particular estates and the proprietors of the freehold were the authors of these very lands which settled the conflicting claims of themselves and their tenants. Hence arose the popular expressions of 'landlord's fixtures' and 'tenant's fixtures', 'removable' and 'irremovable fixtures'. Till then, however, the rule in favour of the landlord remained unaltered and 'tenant's fixture' was only an exception to the general rule and almost everything annexed to the freehold was regarded as landlord's fixture and irremovable by the tenant. The harshness of the rule was too apparent and it was gradually recognised that the early law of fixture was inequitable in principle and injurious in its effects to the spirit of improvement.

It is interesting to note the stages at which attempts were made by the Courts of England to

afford relief to the tenants from the harshness of the common law rule of fixtures. I can do no better than to quote what Amos and Ferard have said on this point 1 :—

"It is curious" says Amos, "to observe the first attempts which were made by the Courts to afford relief from the strictness of the ancient law. Much hesitation is apparent in the early decisions as reported in the Year Books ; and many subtle distinctions are there relied upon by the Judges, which have since been very properly exploded. It appears, however, that so early as in the reign of Henry VII, an exception from the law respecting annexations to the freehold was recognised in the particular case of tenants, who were said to be at liberty to remove some species of articles, if erected at their own expense on the demised premises. It has indeed been represented that the Courts, at the period spoken of, allowed this privilege to tenants from a politic concern for the interests of trade and manufacture ; but it seems very doubtful whether any principle of so liberal a character is to be traced in their judgments. An important step was, however, made, when the courts thus assumed the power of restraining the rights of the freeholder without the express sanction of the legislature." 2

The courts in modern times based their decisions or more unequivocal principles and although they tried to stick to the rigour of law, their sympathy for the cause of trade and commerce and their zeal for the protection against the harshness of the common law

1. Amos and Ferard's Fixtures, Introduction, page XXI.
2. Vide Introduction, page XXI—The Law of Fixtures by Amos and Ferard.

rule made them from time to time introduce exceptions of so extensive a nature as almost to subvert the general rule.

We are now in a position to see what definition may appropriately be given to the term 'Fixture'. Professors Adkin and Bowen have given a very cryptic definition when they say that "a fixture may be defined as a thing of chattel nature which has been annexed to the land." 1 It is to be observed, however, that the term "annexed" is used here not in its ordinary sense of physical attachment but is used to convey a particular meaning. It means that the annexation or attachment must be of a permanent nature so much so that by such annexation the chattel loses its character as chattel and becomes a part and parcel of the realty. Therefore to constitute 'Fixture' there must be an (1) annexation of a chattel to realty (2) permanent in nature (3) so as to take away the chattel character from the chattel and (4) to cloth it with the realty—and make it a realty. So mere juxtaposition is not sufficient but something more is necessary and "the soil to which it is annexed must be displaced for the purpose of receiving the thing or the thing annexed should be cemented or otherwise fastened to some fabric previously annexed to the soil".2 The accessory quality of a thing thus depends upon its appointed economic purpose, which is to augment the utility of the land with which it is connected.

The question whether or not anything is a fixture, therefore, resolves into a determination of the following points namely (a) the intention of the party making

1. The Law of Fixtures by Adkin and Bowen, page 1.
2. See Bain V. Brand (1876) 1 App. case 762, 772; Turner V. Cameron (1870) 5 Q. B. 306, 311

annexation, (b) mode of annexation and (3) the object and purpose of annexation. If an article is attached to the land, the question at once arises as to whether it is intended to form part of the land. But though intention has its value, it does not play an important part in the determination of the question of fixture. It is material only so far as it can be presumed from the degree and object of attachment. Thus where a gas-engine is affixed to the floor of a building it was held that although the article was so annexed, the intention of the attachment was to carry on trade by the tenant affixing it and so it is removable by him. 1

Annexation may be of various kinds, namely actual and constructive, direct and indirect. Where the thing is itself let into or united to the land, for example, where a greenhouse is built upon and fixed to land, it is said to be directly annexed. Where however, the thing is fastened to something which, is itself annexed to the soil, as where a boiler is fixed to a green house, it is said to be indirectly annexed. It may be observed, however, that mere physical attachment does not per se make an article a fixture, as for example, a carpet nailed to the floor of a house is not a fixture as it has not lost its chattel nature by the annexation, the object of the attachment being its full enjoyment as a chattel. On the contrary an article may become a fixture even in the absence of physical attachment, as for example, locks and keys, doors and windows, although may be distinct things are considered in law as annexed to the realty. It is thus clear that for the purpose of fixture, annexation may be by act of parties as well as by operation of law and things though not actually and physically

1. Hobson V. Gorringe (1897) 1 Ch 182

connected to the soil, as in the cases referred to above, are considered as annexed by construction of law. This is called constructive annexation. It is based on the maxim "res accessoria sequitar rem principalian" that is to say accessory things go with the principal thing.

With regard to the mode and degree of attachment, it is to be observed that where an article is so firmly attached to the land that its removal necessarily involves destruction it loses its character as a chattel and becomes a part and parcel of the land or building to which it is attached. Thus a wall paper pasted to the walls of a room 1 or the bricks composing the building cannot be removed without material injury to itself or to that to which it is attached, the attachment is sufficient to show that they have ceased to be Chattels. 2 On the contrary if the degree of attachment is so slight that the thing itself can be removed in its entirety without material injury to the realty, question of its removal would be determined by a consideration of the object and purpose of attachment.

With regard to the object and purpose of attachment the test is whether the attachment is for a permanent purpose ; if it is so, then it becomes a fixture, however slightly it may be affixed. The quantum of fixture is important but it is not the only matter which is to be taken into consideration. The mode of fixing is often immaterial and if it is ascertained that the mode of fixing was absolutely necessary for the enjoyment of the chattel as chattel and if it can be removed without material injury to the realty

1. D'Eyncourt V. Gregory (1866) 3 EQ 382, 390
2. Whitehead V. Bennett 27 L. J. ch 474 ; Wake Vs. Hall, 8 A. C. 195

it retains its chattel character notwithstanding the permanent mode of attachment. 1 The nature of the article in such cases in an important factor but the object and purpose of attachment is still more important and in every case its particular circumstances must be taken into consideration. It is remarkable that the cases of this nature present great difficulty in deciding as to whether they are fixtures or not. Sometimes they are and sometimes they are not and much depend upon the nature of the article as well as the interest of the party affixing the chattel. As a matter of fact annexation is a question of evidence and if the articles are attached to the land by their own weight the presumption is that they are not fixtures and the onus is upon him to show the contrary who asserts them to be fixtures, whereas if an article is affixed to the land even slightly the presumption is that it is a fixture and the onus lies heavily on him who asserts that it is a chattel. 2

Thus the law of fixture is resolved into two problems for query, namely, first, whether the particular article is a fixture and secondly, whether the particular fixture can be lawfully removed by the person annexing it to the freehold and if so, whether such person is liable for waste. It arises out of a general rule of law that whatever once becomes part of the freehold cannot afterwards be severed by a limited owner or temporary occupier, such as a tenant for life or for years without the commission of waste. The second problem, it may be noted, is not dependent on the first, but it does not arise if the first is answered in the affirmative. It may

1. In Re De Falbe (1900) 1 ch 523, 535.
2. Holland V. Hodgson, 7 C.P. 335, Per Lord Blackburn.

again be noted that both the problems referred to above are questions of law. The first problem although is dependent on a number of facts and circumstances, is not really determined by these facts alone but is mainly dependent upon a question which is essentially a question of law. For whether a particular article is or is not a fixture does not depend solely upon the fact of physical attachment and if it does not become a fixture the law of personal property would apply whereas if it is a fixture it will be governed by the law of real property.

The second problem is purely a question of law. For example, if one removes a Fixture he is prima facie liable for waste but the law often allows tenants for life or for years to remove Fixtures so that mere severance does not constitute waste.

We see, therefore, that right to Fixtures and their removal constitute the whole law and questions respecting these rights arise principally between landlord and tenant, executors of tenant for life or in tail and the remainder-man or reversioner, between heir and executor of a tenant in fee, as well as between vendor and purchaser, mortgagor and mortgagee. Complications often arise as to who would be entitled to the fixture and this forms often the subject of the judicial determination. Then again, there is a good deal of difference between the agricultural fixture and trade fixture. While it is difficult to formulate in a nutshell the law arising out of the complications enumerated above, the following may be stated to be the general principles underlying the English law of Fixtures.

In the case of landlord and tenant if the thing is brought in or acquired by the tenant, if does not become a fixture but remains as a chattel and

hence his property ; whereas if the article is a fixture the question arises whether the tenant has a right to remove it during the term, and if he fails to do so, whether his right of removal still remains on the expiry of his term.

As between heir and executor of a tenant in fee when it is decided that a particular article is or is not a fixture, the property in the article requires not further consideration. If it is a fixture it belongs to the heir and passes to him along with the land, if it is not a fixture the article is a mere chattel and goes as personal property to the executor.

Similarly as between the executor of a tenant for life and the reversioner or remainderman, if the particular article belonging to the tenant for life is not a fixture, it would go to the executor of the tenant on his death, but if it is a fixture, then the question would be whether the executor can remove it or it would go to the reversioner or remainderman with the land.

As between vendor and purchaser, if the land is sold, all fixtures pass with the land to the purchaser, so that when once it is decided that a particular article is a fixture, no question arises as to the right of removal by the vendor after the date of the contract for sale.

The law between the mortgager and mortgagee is similar to that between vendor and purchaser. All fixtures pass with the land to the mortgagee who has the same right of removal as the mortgagor. With regard to fixtures which are attached to the property after the mortgage it may be said that the law is established and these would belong to the mortgagee. 1

1. Vide Bowen's Fixtures, Introduction XXXIX.

The principles involved in the propositions stated above are that as Fixtures accede to the soil they go to those who are entitled to the land and when articles retain their chattel character, the law of Fixture does not apply and they are disposed of in accordance with the law of personal property. Having regard to the maxim that whatever is annexed to the land forms part of it and as land is immovable, it may be observed in this connexion that Fixture is a rule and the right of removal is an exception. Thus the general rule of law regarding annexation made by a tenant during the continuance of his term is that whenever a tenant has affixed a thing to the demised premises he can never sever it without the consent of his landlord. The property being annexed to the land immediately belongs to the freeholder ; and the tenant by making it a part of the freehold is considered to have abandoned all future rights to it so that it would be waste to remove it afterwards. It therefore falls in with his term, and comes to the reversioner as part of the land. 1

It is to be observed that the law as enunciated above was strictly and scrupulously followed for a long time in England. And although the harshness of the rule was later on recognised, the courts were reluctant to make a departure from what they thought to be the well established principle of Fixture.

It was only with the expansion of trade and industry that the Courts of England showed a tendency to make in some cases liberal constructions of law in favour of the tenants.

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1. Co. Litt 53a, 40 Co. 64, Herlakenden's case—Moore, 177, 3 East. Vide also Amos and Ferard's Fixtures, page 15.

With the Industrial Revolution the wealth of the country increased and there was a great change in the mode and style of living too. Thus gradually the construction of law with regard to the removal of Fixtures in favour of trade was also extended to Fixture for domestic and ornamental use. But till then the question of agricultural Fixture was left without any change and it is only in recent times that the old common law in this connection has been modified to a certain extent by statutes. The rigour of law with regard to agricultural Fixture may be attributed to the pecular law of real property prevailing in England and to the great importance attached then to the land.

The law in this connection has been clearly enunciated by Lord Halsbury. "In regard to Fixtures", says Halsbury "and a claim to remove them, the law has regard to the relation of the parties, and differs according to that relation. It will suffice to mention 3 sets of cases. As between landlord and tenant, the claim of the tenant to remove Fixtures set up by himself is the most favoured; as between tenant for life and remainder-man, the claim of the tenant for life to remove Fixtures set up by himself is less favoured; and as between executor and heir, where both claim under the same owner, the claim of the executor to remove Fixtures set up by the owner is still less favoured." 1

We have seen from the above that irremovability of fixtures was regarded for a long time as an

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1. Vide the Judgment of Halsbury in Leigh V. Taylor at page 36 of The Law of Fixtures by Adkin and Bowen. Norton V. Dashwood (1896) 2 ch 497, 499 Per Chitty J; Elwes V. Maw (1802) 3 East 38, 51.

inflexible rule and where its removal was granted, it was granted as an exception. We have seen also that the question of removal was considered by the Courts of England from several standpoints, namely the nature of the annexation, the object and purpose of the annexafion and the relation of the parties claiming for removal. We have in this connection quoted from the dictum laid down by Justice Chitty in Norton V. Dashwood 1 that the claim of the executor to remove fixtures set up by the owner against his heir is less favoured, so that the inheritance may not be supposed to descend to the heir prejudiced or imperfect. From an analysis of the leading cases on the subject it may be stated that as between the executer of the owner in fee and the heir, the executer is not allowed to remove from the inheritance more than that which has been annexed to it by the tenant. The exceptions recognised in favour of domestic and trade fixtures are not applicable to questions between the heir and the executor of a tenant in fee.

Thus the general rule was the irremovability of fixtures and it may be said that the only relaxation made to the general rule was in favour of trade and domestic fixtures only. And this relaxation was granted gradually by a series of decisions in which, curiously enough, the tendency of the judges was to allow removal not on general policy but on legal subtleties and nice distinctions. So when turning to the case laws on the subject we find that the early authorities including the Year Books held that whatever was annexed to the freehold should descend to the heir as part and parcel of the inheritance. But it may be said that the relaxation in favour of trade was

1. 1 Salk 368.

also conceded from time to time even in those early days. Thus in Pool's case [1], Lord Holt said with regard to a particular class of fixtures that the right of the tenant to remove erections of that description was by the *common law*. The fixtures to which Lord Holt refers, it may be mentioned here, are those which a tenant erects upon the demised premises for the purpose of trade and manufacture. But it should be remembered that it took many years to make it a settled law.

Having thus enumerated the general principles of removal, let us see how far these principles have been confirmed or modified by judicial decisions. It may be noted here that the removal under discussion refers to trade fixtures and not agricultural fixture which we shall notice later on. When dealing with the question of removal, the relation between the parties must be taken into consideration. Thus as between the executor and the heir of a tenant in fee, it has already been observed that it is general law, that the heir and the real property should be preferred. Let us see how far this has been modified by judicial decisions.

The earliest authority occurs in a case reported in the Year Book 20 Hen, 7, page 13. [2] There the question was whether a furnace fixed to the freehold with mortar should go to the executor or to the heir of the owner of the fee who had put it up. It was held that it should be regarded as the tenant's personal property, as such it would go to the executor. Their Lordships (Rede. C. J., Fisher and Kingsmill J. J.) in the course of their judgment observed "If a lessee

1. 2 ch 497, 499.
2. 20 Hen 7, at page 3.

for years set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation, during the term he may remove them."

The case referred to above has its importance in this respect that it is regarded as the earliest authority which recognised relaxation of the rigid rule in favour of trade. And although there was much discussion as to the scope and significance of the decision, as to whether the relaxation was confined in that case to trade fixture only or extended to all other fixtures for domestic or ornamental use, still it may be said that it marked the first stage of change in the rigid rule.

The next case which deserves mention in this connection is the Cider mill case. It is curious to note that the case was not reported in any reports. It was, however, brought to light from its obscurity by Lord Hardwick in Lawton V. Lawton I who gave so much prominence to it that the principles laid down in the Cider Mill Case were approved and spoken of with great respect. In the Cider Mill case an action of trover was brought by an executor against the heir, in respect of a cider mill let into the ground and annexed to the freehold. Chief Baron Comyns who tried the case at Assizes of Worcester held that the mill was the personal estate and the jury were directed to find for the executor. For a time the Cider Mill case created a great consternation in the legal world, in as much as it was then thought that the removal of fixture for the purpose of trade and domestic comforts was clearly established by the Courts. The expectation of the traders and tenants was all the more enhanced when in another

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1. (1743) 3 Atk 14.

case viz:—Dudley V. Warde 1 the same judge Lord Hardwick again stated that his decisions were based on the authority of the Cider Mill case. The Cider Mill case was again brought into prominence by Lord Ellenborough, when he recognised the authority of Chief Baron's decision in Elwes V. Maw 2 and observed that the Cider mill was to be considered as accessory to the trade of making Cider.

It may be observed, however, that whatever importance might have been given to Chief Baron's decision in the Cider Mill case by Lord Hardwick and Lord Ellenborough, the decision did not receive the general approval of the Judges in later days. Thus so early in 1782 Lord Mansfield in Lawton V. Salmon 3 dissented from its principles and doubted the correctness of the decision. The case decided by Lord Mansfield was an action for trover brought by an executor against a tenant of the heir to recover certain saltpans used in saltworks and which had been erected by the testator in his life time. They were fixed to the floor with mortar so that they might be removed without injury either to themselves or to the freehold, though the salt works would be of no value without them, whereas they were worth £ 8 per week to the heir. In the course of his judgment in favour of the heir, Lord Mansfield observed that the salt spring must have been set up by the owner for the benefit of the inheritance and as a means of enjoying it. And hence it must go to the heir.

In the case of Fisher V. Dixon 4 which came up

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1. (1751) Ambl 113.
2. (1802) 3 East 38.
3. (1782) 1 H. B L 259 (n).
4. (1845) 12 cl and P. 312.

before the House of Lords, the property in dispute comprised certain engines, machinery, colliery utensils, rails etc. and the point for determination was whether the articles passed with the estate to the heir or would be regarded as personal property so as to go to the executor, the noble Lords held that the articles in question passed with the estate to the heir. It is interesting to read the remarks of the learned Lords which are of considerable importance with regard to the law of fixtures. Thus Lord Brougham observed that the decision in the Cider Mill case was contrary to the general principles of law on the subject. Lord Cottenham remarked that "the principle upon which a departure had been made from the old rule of law in favour of trade, appeared to him to have no application to the present case, a case as between the heir and the executor of the owner in fee who erected the machinery. It was not at all necessary in order to encourage him to erect those works that any rule of that kind should be established because he was the master of his own lands and with respect to the Cider Mill case it was impossible to extract a rule of law from a case of which so little was known." And Lord Campbell in a concurring judgment observed that the arguments respecting the benefit of trade did not apply to a question between the heir and the executor in a case like the present.

The law regulating fixtures for the purpose of trade applies mutatis mutandis to the fixtures annexed for the purpose of ornamental decorations or domestic convenience. Or in other words an article annexed for ornamental purpose or domestic use can be severed if the removal does not cause material injury to the inheritance, but if it does, it cannot be severed and taken away by the executor as part of the

personal estate. The principle was enunciated in what is known as Herlakenden's case 1 where it was held that wainscots put up with screws remained with the freehold.

The first relaxation from the strict rule in favour of the heir was made in the case of Squier V. Mayer 2 in which it was held that furnace though annexed with the freehold and purchased with the house and the hangings nailed to the walls should go to the executor and not to the heir. It may, however, be remarked here that in several subsequent cases 3 the decision in Squier V. Mayer was doubted and Lord Mansfield in Lawton V. Salmon 4 observed that the relaxation in favour of ornamental fixtures was confined to disputes between landlord and tenant and was not extended to the executor against the heir and the same view was expressed by Lord Ellenborough in Elwes V. Maw. 5.

With regard to the right of the executor to remove fixtures as against a devisee, the general rule is that when land with fixtures annexed thereto is bequeathed by a will, the fixtures would pass to the devisee, who as between the executor of the person annexing the fixtures, stands in the same position as the heir.

With regard to the right of removal by the tenant as against the landlord, the principle is the same and since the statute of Gloucester it is a generally recognised law that whenever a tenant annexes certain

1. (1589) 4 Co. Rep. 62 a, 64 a.
2. (1701) 2 Freem 249.
3. Cave V. Cave (1705) 2 vern 508 ; Beck V. Rebew (1706) 1. P. Wms 94 ; Birch V. Dawson (1834) 2 A and E 37.
4. Supra.
5. Supra.

thing to the demised premises during his term, he cannot remove it afterwards without the consent of the landlord and if he does so, he would be liable for waste. It has already been observed that the harshness of the rule called for a revision in the hands of judges by liberal constructions of the rigid law and it has also been observed that the courts though at first were reluctant to depart from the common rule gradually did so, first by way of distinctions from the general rule and subsequently on a broader principle of public policy and encouragement for trade and commerce. They went a step further when with the growth of the modern standard of comforts and living, there was a general demand for the relaxation of the common law rule in favour of the removal of ornamental and domestic fixtures and the Courts in England acceded to the general demand. We have already noticed the stages of evolution by which the rule of irremovability of fixtures was replaced by their removal at first with regard to trade fixtures and then with regard to domestic and ornamental fixtures also. We have also cited the authorities on the subject beginning with the case reported in the Year Book 1 by which the dyers and the bakers were allowed to remove their vats and vessels as well as other implements annexed to the freehold but necessary for the purpose of trade. We have also discussed the modern leading decisions on the subject, viz:—Pool's case, Lawton V. Lawton, Dudley V. Warde, Lawton V. Salmon and Elwes V. Maw. 2 These cases establish the proposition that the tenant has an indisputable right

1. 20 Hen 7 at page 13.
2. Supra.

to remove fixtures which he has annexed to the demised premises for the purpose of carrying on his trade. In the case of Elwes V. Maw, Lord Ellenborough went a step further when he observed that the removal of the tenan'ts fixtures was founded upon the ground that the carrying on of a trade was a matter of a *personal* nature and hence should be guided by the law of *personal* property. Thus by a series of decision soap boiler's or dyer's vats, salt pans fixed with mortar to a brick floor in saltworks, baker's ovens, furnaces, coppers, brewery utensils and stilts and pipes connected to them, steam engines and other machinery used in a colliery, gas engines affixed to the floors of a building, looms in a mill, spinning machines fastened to the floor etc. were held to be removable by the tenant.

The articles referred to above, it may be remarked here, were either mere utensils for trade or machinery employed for trade Those articles or the component parts of them were capable of, after their removal, being employed for similar purposes elsewhere. Greatest complications arose, however, with regard to building or substantial erections put up for purposes of trade. Thus in the case of Dean V. Allalley [1] a tenant had during his term, erected certain sheds or buildings called Dutch burns. The foundation or plinth of the sheds was of bricks and rooted to the ground and upright fixed in and rising from the brickwork, and supporting a tiled roof with sides open, the question arose as to whether the tenant was at liberty to remove those erections during the term, it was held that he could do so. In his judgment Lord Kenyon observed : "If a tenant will

1. (1799) 3 Esp. 11.

build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord ; but the law will make the most favourable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enables him to carry it on with more advantage. It has been held so in the case of Cyder mills, and in other cases ; and I shall not narrow the law but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

Another case deserves mention here and that is the case of Penton V. Robert. 1 In this case the tenant erected a building and the building had a brick foundation let into the ground with a chimney belonging to it. Upon the foundation a wooden plate was laid, upon which a superstructure of wood was raised and the quarters belonging to the superstructure were morticed into the wooden plate. It was used as a varnish-house for varnish manufacture. It was held that the tenant was entitled to remove it. The following observations of Lord Kenyon, C. J. is interesting as it marks the change in the attitude of the courts in respect of the tenant's right to remove fixtures. His Lordship observed : "What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it. Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis who expend thousands of pounds in the erection of green-

1. (1801) 2 East 88

houses and hot houses, etc.. are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade ? If it were otherwise, the very object of their holding would be defeated. * * *. Here the defendant did not more than he had a right to do ; he was in fact still in possession of the premises at the time the things were taken away."

The leading case on the subject is Elwes V. Maw, 1 where Lord Ellenborough discussed the whole question of the tenant's right to remove fixtures annexed by him for the purpose of trade. In that case the tenant made substantial erections of brick and mortar having foundations let deep into the soil but they had been erected for agricultural purposes and not for trade. Lord Ellenborough though refused to extend the privilege of removal to agricultural fixtures, recognised the privilege given to tenants for removal of buildings annexed for trade purposes. His objection therefore was not based on the nature of the substantial construction of the buildings themselves, but on the object and purpose with which they had been erected.

The decisions cited above undoubtedly paved the way in favour of the tenants and was distinctly a great advance upon the old common law rule, but it may be observed that the principles involved therein, when pushed to its logical extreme might lead to far-reaching and often disastrous consequence. For instance, it may be said that those cases recognised the rights of the tenants to remove any erections however substantial, subject only to the limitation

1. (1802) 3 East 38.

of their being used for the purpose of trade. So, in other words, under those decisions, any building, if held to be a trade fixture, could be removed by the tenant. While this was greatly advantageous to the tenants no doubt, it was subversive of the main principle out of which those exceptions arose. It was therefore thought that some limitations must be put to the unconditional rights of removal so extended by judicial interpretation. When, therefore, the question came up for decision in the case of Whitehead V. Bennet, 1 it was argued on behalf of the tenant that buildings made of brick with foundations rooted into the soil to any depth were removable by the tenant if the building was erected for the purpose of carrying on trade. It was held that the mere fact that the buildings were used for trade purpose did not entitle the tenants to remove them.

The case was subsequently approved and followed in Wake V. Hall 2 and its principle was adopted in the recent case of Pole-Carew V. Western Countries Manure Company. 3 In that case the Company had erected at their own expense, upon the premises occupied by them under a lease, various buildings for the purposes of their manure manufacture and also a complete set of Sulphuric Acid making plant, consisting of pyrites burners, four reaction chambers of great size and two towers. Three of the chambers were very large in size and each consisted of a rectangular leaden vessel supported by and enclosed within a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on, but not fixed to, stone

1. (1858) 27 LJ. ch 474.
2. (1883) 8 App. cases 195, 208.
3. (1920) 2 ch 97

walls and pillars, except in the case of one chamber, which rested almost entirely on unfixed iron columns. The fourth chamber was really an open tank standing on a wooden platform upon beams which themselves rested on the stone walls and pillars. It was held that the towers and the chambers must, having regard to all the circumstances be regarded as integral portions of one composite building permanently annexed to the freehold and not as chattels or as tenant's fixtures.

From an analysis of those cases, it may be said that "in order that a trade fixture may be removable by the tenant it is essential, in general, that it should be capable of being put together again in the same form elsewhere, and that it should not be necessary for this purpose to reduce the fixture to its component *materials* as distinguished from its *component* parts.." 1

Market gardeners and nurserymen stand on a different footing and their rights to remove glass-houses and greenhouses erected for the purpose of their trade and rooted to the earth to some extent are generally recognised. The first case on the subject is that of Syme V. Harvey. 2 In that case the tenants were nurserymen and wanted to remove a green-house, a propagating house, and some hot bed frames erected by them. It was held that the tenants could remove those portions of the erections which consisted of frame work.

The next case is that of Mears V. Callender. 3 In that case there were ten glass houses erected by the tenant. Some of them were supported by and

1. Vide Adkin and Bowen's The Law of Fixtures page 84.
2. 24 D 202 (1861).
3. 2 ch 388 (1901).

nailed to wide Sills, which were nailed to and supported by wooden piles rooted to the earth. It was held that the glasshouses could be removed by the tenant.

With regard to accessory buildings it may be said, following the dictum of Lord Ellenborough in Elwes V. Maw, 1 that a building which is accessory to a removable thing is also removable with the thing itself without substantial injury to any thing. Since that decision, the courts went further and it may be said that now the law is, that a tenant is not precluded from his rights of removal of a trade-fixture, even if the accessorial building may be injured by the removal.

The general principles regulating the removal of domestic and ornamental fixtures are similar to those of trade fixtures.

It has already been said that although great relaxations were made by the Courts in favour of trade, so much so, that now-a-days generally trade fixtures are removable by the tenants, the old common law rule with regard to Agricultural Fixture remained for a long time quite unchanged. Thus the old common law on the point was clearly enunciated by Lord Ellenborough in Elwes V. Maw, 2 and this case is still regarded as a leading case on the subject of fixtures. In that case the tenant had erected on the land, demised to him for agriculture, a beasthouse, carpenter's shop, fuel house, cart house and fold yard, all built of bricks with tile sheds and rooted to the earth. It may be noted here that the said erections were made by the tenant at his own cost and expense and for the more convenient occupation of his Farm. It was held, however, that the tenant could not remove those things.

1. 3 East 38.
2. 3 East 38 (1802).

In delivering judgment Lord Ellenborough observed that the relaxation in favour of trade fixtures did not apply to agricultural fixture and so if the tenant removed those articles (Fixtures) during his term he would be liable for waste, no matter even if he left the premises in the same estate as when he entered.

The case is important in as much as it draws for the first time a distinction in unequivocal terms between trade fixtures and agricultural fixtures. The harshness of the rule laid down in the above case and the partiality for the trade evinced therein roused protests from all quarters and the result was the enactment of Landlord and Tenant's Act of 1851, which provided that if the tenant erects any building, engine or machinery either exclusively for agriculture or for agriculture and trade at his own expense and with the previous consent in writing of the landlord, it may be removed by the tenant as his own property even though it is fixed to the soil. provided also that before removal he must give one month's notice in writing to the landlord or his agent and the landlord will have the option of purchasing them. A further change in favour of the tenant was made by the passing of the Agricultural Holdings Act of 1875 and the said Act was amended in 1883, 1900 and 1908 to 1920 and thus the statute now provides that a tenant is entitled to compensation from his landlord at the determination of his tenancy and on quitting his holding, to also compensation in respect of improvements made by him and subject to certain conditions to remove Fixtures and buildings for which no compensation is payable and which are not affixed or attached by the tenant on behalf of the landlord and in pursuance of some objection to him.

Thus it may be said that although irremovability

of Fixture was the general rule regulating the subject, the theory has in modern times undergone a great change in favour of both the agriculturists and traders, as well as in favour of the people at large for their domestic and ornamental use, the former by statutory provisions and the latter by judicial interpretations It may therefore be remarked that although in theory the Common Law rule of irremovability still prevails, in practice, however, it has been modified to such an extent that removability of Fixture either for trade and domestic use or even for agriculture has become the general rule and irremovability of Fixture has been reduced to an exception only.

Another question with regard to the English law of Fixtures deserves some notice here and that is the question of substituted Fixture. If a tenant substitutes his own Fixtures on the demised premises for those of the landlord, questions may arise as to whether he will be allowed to remove them at the expiry of his term. The general rule is that he can do so unless it is clear from the covenant that it was the intention of the parties to leave the new fixtures in the premises for the benefit of the landlord.

It has been observed before that if a land is mortgaged, all fixtures pass with the land to the mortgagee who has the same rights of removal as the mortgagor. [1] Therefore on mortgage, Fixtures, attached to the land mortgaged, pass with the land although they are not specifically named in the mortgage deed.

A contrary view was, however, expressed by Lord Hardwick in the case of Exparte Quincey. 2 In that

1. Vide Adkin and Bowen on Fixtures. Introduction XXXIX.
2. 1 Atk 477.

case a person sold the utensils and granted a lease of a brew house, and afterwards mortgaged the brew house with the appurtenances to another person. Thereafter, the lessee sold his lease and utensils to one A, who, for a sum of money, mortgaged the whole to the original proprietor. Afterwards the original proprietor took bankruptcy and thereupon the fixtures were litigated between his assignees and the first mortgagee of the brew house. It was held by Lord Hardwick that the fixed utensils of the brew house did not pass by the mortgage, as such the mortgagee would have no right to claim the fixtures. In delivering judgment his Lordship observed that "if a man sells a house where there is a copper or a brewhouse, where there are utensils, unless there was some consideration given for them they would not pass."

The effect of this decision was that for sometime it was thought that fixtures would not in any case pass by a mortgage of the land, unless they were *specifically* mentioned in the mortgage deed.

The view thus expressed by Lord Hardwick was, however doubted and dissented from as the subsequent decisions would show. Thus in the case of Ryall V. Rolle 1 it was held by Parker, Ch, B, that by a mortgage of the freehold fixed utensils would pass to the mortgagee. The same view was also expressed in the case of Steward V. Lombe 2 where a windmill with wooden edifice was built on brick work and was anchored into the ground, being one foot under the surface of the earth but removable at pleasure. It was held that it was not a

1. 1 Atk 175.
2. 1 Brod and Bing 509.

fixture, but it was also held that having regard to the fact that its connection with the land was of such a nature that by a conveyance of the land, the purchaser would be entitled to the mill without any mention of it in the deed.

It happens sometimes that the mortgagor retains possession of fixtures even after the mortgage of the land to which they are attached. It might be contended on the authority of Lord Hardwick's dictum in Exparte Quincey 1 that as fixtures might be regarded as personal chattels, the possession of them by the mortgagor after a conveyance would be inconistent and would be a proof of fraud. Therefore, having regard to the mortgagor's possession, it might be presumed that it was so contracted. So in the absence of an express contract to the contrary the mortgagee would have no right to the fixtures.

The case of Ryall V. Roll 2 mentioned above gives a lie to this contention. In that case a brewer borrowed some money on the mortgage of his dwelling house and brewhouse and all the coppers and utensils of trade belonging thereto and assigned the same to the mortgagee, subject to his right of redemption but continued in possession. In a suit between the first mortgagee and the subsequent mortgagees and creditors, it was contended on behalf of the subsequent creditors that the first mortgage was invalidated because of the fraudulent possession of fixture by the debtor mortgagor. It was held that it was not so, and it was further held that the fixtures would pass with the mortgage and in spite of the possession of them

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1. 1 Atk 477.
2. 1 Atk 165.

by the mortgagor, he would not be entitled to remove them until the mortgage was satisfied.

It may therefore be said to be clearly established that things affixed to the land partake so much of the nature of reality, that they pass with the land to the mortgagee on mortgage, even though they are not specifically mentioned in the mortgage deed and the same principle would apply, even if the mortgagor retains possession of the fixtures. [1]

With regard to fixtures attached to the mortgaged property after the mortgage, it may be said that the law is established that they would pass to the mortgagee. [2]

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1. Vide Sugden's Vendor and Purchaser, page 30 ; Powell on Mortgage, Vol I page 40, Vol II page 1040. See also Amos and Ferard's Fixtures, pages 189 to 192.

2. Infra ; see also Adkin and Bowen's Fixtures—Introduction XXXIX.

CHAPTER II.

The General History Of The Law Of Fixtures In British India.

The term 'Fixture' has no precise legal definition in India. The word is not so familiar here either in law or in common parlance as in England. And although the principle of Fixture was known to the Hindus even in the days of Manu and Narada [1] and among the Mahamedans from very early days, the law of Fixture is not so developed here as in England. The principles of Fixtures as embodied in the codes of Manu and as subsequently explained in the Narada Samhita resemble in its essentials the Roman law and the common law of England and even in some respects are in advance of both, but the vast change and the rapid growth which the law has undergone in the hands of the judges in England in modern times is not known in India. Hence it may be said that the present English law of Fixtures is far ahead of the Indian law on the subject. The great Industrial Revolution in England marked an era of advancement in every sphere of life and activity and led to the growth of trade and commerce, to the increase of wealth and simultaneous rise in the standard of comfort and living. The changes so produced called for a change in the legal rules too, and the result was a gradual relaxation of the old rigid law of Fixtures in favour, first, of trade and then of domestic and ornamental use. The inequity of the common law with regard to the agricultural fixtures was also gradually evinced and

1. Ibid.

since the decision of Lord Ellenborough in Elwes V. Maw, [1] declaring the irremovability by a tenant of agricultural fixtures, the subject received the attention of the legislators and statutory provisions [2] were imported to supplement the insufficiency of the common law according to the changed conditions and environments.

In India, however, things were altogether different. Before the advent of the British, law here was theoretically at least, inflexible. Both the Hindu and the Mahammedan Jurists conceived of law as being of divine origin and as such immutable. Law certainly could not afford to remain fixed when there were so many changes in the circumstances of the people amongst whom it prevailed. It is beyond our purpose to examine the method, if any, that was followed during this period to meet the demand of change. All that we can say with certainty, is that legislation was not the method that could be thought of by the Hindu or Mahamedan Jurists.

It was only with the advent of the British in India, that a codification of the law of property was first contemplated to suit the requirements of the country. But it took sometime for the English legistators before aiming at any attempt for codification. Nor did the situation then afford an easy solution for collection of the old customary laws and usages and for codification. The diversity of the people, diversity of their interests and diversity of their habits and customs stood in the way of homogeneity and the first legislators found it a difficult task to make out a homogeneous rule suitable to the diverse habits and customs of the people.

1. 3 East 38.
2. Vide Introduction.

It so happened therefore that the early British legislators, instead of codifying a law of property in India, laid down that in *some cases*, the Hindus would be governed by the Hindu law, and the affairs of the Mahamedans would be regulated by their law, whereas in *other cases*, justice would be adminstered according to the principles of equity and good conscience. The earliest reference of this system may be found in section 17 of the Regulation of the 17th April, 1780, [1] wherein it was laid down that in "all suits regarding inheritance, marriage and caste and other religious usages and institutions, the law of Koran with respect to the Mahamedans and those of the shastras with regard to the gentoos should be used". In the following year there was an important addition and the word 'succession' was added after the word 'inheritance'. A statute-law relating to British India was then enacted in 21 Geo. III. [2] Section 17 clause 70 of the said statute laid down that "between the inhabitants of Calcutta, their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the law and usages of Mahomedans and in the case of Gentoos by the law and usages of the Gentoos; and where one only of the parties should be a Mahomedan or Gentoo by the law and usages of the defendant." [3]

With regard to Mufassil, we find the early enactment [4] in Regulation IV of 1793, wherein it was

1. Vide Regulations.
2. 21 Geo. III.
3. Vide in this connection Morley's Administration of Justice in India, page 174.
4. Vide Regulation IV of 1793.

provided that the Zilla Courts should decide those questions according to justice, equity and good conscience. Thus we see, that before the codification of the law of property in British India, there were two sets of laws, one for Mufassil and another for Calcutta. It may be remarked here, that with the exception of those questions stated in the aforesaid statutes, the law of the people of Calcutta was mainly the law of England. Thus it was held in Savage V. Bancharam Tagore [1] (Morton's Dec. by Montrion, 105) that subject to section 17 of the English statute 21 Geo. III, the law prevailing in Calcutta was the English law. For a time English law and principles were the guiding principles in the Courts of India, so much so that all the decisions of the period were based on English law. The Courts in India went a step further when their decisions received the approbation of the Privy Council and it may be said that in *some cases* the English law of inheritance to the real estate even was introduced in India where the parties were neither Hindus nor Mahamedans. [2] It was also held, in several cases, that the principles of equity and good conscience, as then administered in India, were subject to the customary laws of the country based on the laws of England. It may be said therefore, that prior to the passing of any Act, Courts in India were mainly guided, with regard to cases on property, by the English law and principles. The questions of Fixtures were thus decided upon English law and principles. It was often argued then that Fixture being a question of accession and not of

1. Morton's Dec. by Montrion 105.
2. Gardiner V. Fell, 1. M. I. A. 299 ; Freeman V. Fairley, 1, M. I. A. 305 ; The Mayor of Lyons V. The East India Company, 1, M. I. A. 276.

succession and inheritance, the law applicable here would be the common law of England. As matter of fact whether English law would apply to such cases was the principal point for determination for sometime till the matter was set at rest by the Full Bench decision in Thakur Chandra Pramanik V. Ramdhan Bhattàcharj [1], where Sir Barnes Peacock C. J. held that English law did not apply with regard to Fixtures in India.

It is interesting to note here the confusion of ideas with regard to the law of Fixtures in British India, prevailing in the minds of the Judges of the period under review and conflicting decisions arising thereto, so much so, that the decisions were seen often overlapping and overriding each other. In some cases it was held that in questions relating to fixtures English law would apply, while in other cases it was held that the English law would not apply.

The earliest reported case on the subject is the case of Khoderam Sarma V. Trilochun, [2] It was laid down there, that if a member of a joint Hindu family built a brick-house on the ancestral land with separate funds of his own, such house would not be a property in which shares might be claimed by his co-parceners. It was held there, that co-parceners in the land would only have a claim on him for other similar land equal to their respective shares.

The next case is the case of Janki Singh V. Bukhoree Singh, [3] decided on the 28th of August 1856. It was held there that the maxim "Quic quid plantatur solo solo cedit, was not applicable in India

1. 6 W. R. 228 (F. B.)
2. 1 Select Reports. page 46.
3. S. D. A. Reports (1856) page 761.

in its entirety." That was a suit for demolition of buildings erected on joint property by a member of a joint Hindu family without the consent of his co-sharers. It was held by a special Bench consisting of Trevor, Samuels and Money JJ. that an action for the demolition of the buildings by the co-sharers could be sustained. The lower Appellate Court, in that case, held that under the approved maxim 'Quic quid plantatur solo solo cedit' it was beyond doubt that the plaintiffs as joint proprietors in the land would have a joint property in the litigated buildings and could enforce their rights therein in various ways, but an action for their demolition could not be sustained. With regard to this observation of the District Judge, their Lordships of the Sudder Dewani Adalat held "Had the maxim cited by the Judge been adopted as law in this country with reference to buildings erected upon land with either the express or implied consent of the owners of it, we should have no difficulty in assenting to the reasons for the Judge's decision, as well as that decision itself, as however, that maxim has never been applied in this country *in the mode in which the Judge has applied it*, we find ourselves unable to assent to the reasoning of the Judge as correct. That every co-proprietor has a right of veto to forbid anything being done to the common property without his consent seems to us undoubted ; and it is equally clear that with a view of enforcing this right, a person can sue to restrain his co-sharers from building on the common property." [1]

The principles enunciated in the aforesaid case of Janki Singh V. Bukhori Singh, were followed in

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1. S. D. A. Reports (1856) page 761.

another case [1] decided on the 21st of September 1858 and reported in Sudder Dewani Adalat Reports (1858) page 1517. In another case [2] decided on the 25th November 1863, their Lordships of the Sudder Dewani Adalat (N. W. P.) expressed similar views.

The next case is the case of Govinda Pramanik V. Guru Charan Dutt. [3] It was held there by Trevor and Campbell, JJ. that if a person entered upon the land of another and built a house thereon, the owner of the land was entitled to recover possession of the land by destroying the house, if there was no proof of acquiescence on his part in the act of injury done. The same principles were enunciated in the case of Kali Prosad Dutt V Guru Prosad Dutt and others [4] decided in 1866. It was a suit by A to recover possession of certain land and to pull down straw-huts erected thereon by B. A, having proved his objection to B's building on the land, on failure of B to show any permission from A to build the huts, it was held by Trevor and Glover JJ. that B was rightly ordered to pull them down.

When the case of Thakur Chandra Pramanik V. Ramdhon Bhattacharjee [5] came up for hearing before Bayley and Macpherson JJ. their Lordships, however, held otherwise and ultimately referred the case to the Full Bench. The decision of the Full Bench on the point is very important and is regarded as a leading case on the subject. The decision was followed by Sir Bhasyam Ayangar in the case of

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1. S. D. A. Rep (1858) 1517.
2. S. D. A. Rep (1863) 418.
3. (1865) 3 W. R 71.
4. (1866) 5 W. R. 108.
5. 6 W. R, 228 (F. B.)

Ismail V. Nazarali [1] and by Sir Ashutosh Mukherjee in Mofiz Sheikh V. Rasiklal [2] and is still regarded as good law. It would therefore not be out of place to discuss the case here in some detail.

It was a suit for ejectment. Question arose as to whether buildings erected bonafide on the lands of another could be removed by the person on ejectment. Upon this, their Lordships observed :—"Buildings and other such improvements made on land in the Mufassil do not, by mere accident of their attachment to the soil, become the property of the owner of the soil. If he who makes the improvement is not a metre trespasser, but is in possession under any bona-fide title or claim of title, he is entitled either to remove the materials or to obtain compensation for the value of the buildings at the option of the owner." [3]

It has already been said that the case was referred to a Full Bench by Bailey and Macpherson JJ. Following were the terms of reference viz :—"There is a conflict between our decision and the decision of another division Bench on this point, in respect of which the above order was passed, the question involved being, whether a person who, being in possession of land as proprietor, erects *pucca* buildings (of bricks etc.) thereon, has a right, on being subsequently ejected from the land as having no title, to pull down those buildings and remove the materials.[4] In the present case we decided that *he*

1. 27 Mad 211.
2. 14 C. W. N. 952.
3. Per Sir Barnes Peacock in Thakur Pramanik's case, 6 W. R. 228 (F. B.)
4. Compare Medieval German Law—Huebner's Germanic Private Law, page 172 (Supra).

has no such right. In the case in [3] W. R. 71 the decision is contrary."

It may be observed, however, that the case of Thakur Chandra Pramanik V. Ramdhon Bhattacharjee,[1] related to the question of Fixture in Mufassil and did not decide the question of Calcutta. The question of removability of Fixture by a tenant in Calcutta arose in the year 1875 in the case of Parbati Bewa V. Umatara Devi, [2] before Macpherson J. In that case the plaintiff became tenant to the defendant of a certain land in Calcutta and at the time of becoming such tenant purchased from the outgoing tenant with the defendant's knowledge two tiled huts which were then standing on the land. It was alleged, that there was a custom in Calcutta empowering the tenant to remove those huts at the expiry of his term. It was held that having regard to the custom alleged, and in view of the tacit acquiescence of the landlord the tenant could remove them. It is remarkable that the Full Bench decision of Thakur Chandra Pramanik was discussed and followed there. But the decision in Parbati Bewa [3] cannot be said to have laid down any law on the question of Fixture in Calcutta, in as much as the decision was based on the custom set up by the defendant. The first authoritative note of dissent from the dictum laid down in Thakur Pramanik's case was struck in the year 1882 by Sir Richard Garth, C. J. and Pontifex J. in the case of Jagat Mohini Dasi V. Dwarakanath Biswas and others [4] wherein their Lordships distinguished the present case from the case of Thakur Chandra Pramanik

1. 6 W. R. 228 (F. B.)
2. 14 B. L .R. 201.
3. 14 B. L. R. 201.
4. 8 Cal. 583.

above referred to, as a case from Mufassil, and doubted the applicability of the aforesaid Full Bench decision in the case of Calcutta, and held, that in Calcutta the English law of Fixtures would apply. His Lordship the Chief Justice (Garth, C. J.) observed :—"It seems to me that the Full Bench rather intended to deduce from these various authorities a rule of equity and good conscience to be generally observed in the Mufassil ; and in the Mufassil probably, even in the present day, such a rule would work equitably. The sort of houses that are generally found there, are, for the most part, readily removable ; and cutcha or semi-cutcha buildings such as are erected by the poorer native population have always been considered as in the nature of movable property. But in Calcutta, the case is very different. The Full Bench ruling if generally applied there, would be productive of great inconvenience ; and moreover we are bound in Calcutta according to the express language of the charter, not by the law of equity and good conscience which prevails in the Mufassil but by the law of equity and good conscience which was administered by the Supreme Court (See Secs. 19, 20, and 21 of the Charter of 1865). The law, I consider, is generally speaking the self-same law of equity which is administered in our courts in England." [1]

From an analysis of those cases, we see that in early British India, questions of Fixtures were determined in Calcutta according to English law and principles, while in Mufassil according to justice, equity and good conscience, which were in their turn based often on English principles of equity and good conscience, subject of course to the customary laws and

1. Per Sir Richard Garth, C J. in the case of Jagat Mohini V. Dwarakanath, reported in 8 Cal 583.

usages, if any, of the country. In the year 1855, an act was passed named "The Mesne Profits and Improvements Act" [1] which provided that if any person had erected any building or made any improvement upon any land held by him *bonafide* in the belief that he had an estate in fee simple or other absolute estate, such person or his heirs or assignees on ejectment would be entitled to have the value of the buildings or improvements as compensation or to purchase the land at the option of its owner causing eviction." It may be noted here, that the Act was applicable only in cases in which the English law did apply. It would thus appear that the aforesaid Act and the decision in the case of Jagat Mohini Dassi [2] created some difference between the laws of Calcutta and Mufassil. The state of affairs in Mufassil naturally engendered uncertainty, in as much as the principles of equity and good conscience were differently construed by different Judges. To put a stop to these differences, the interference of the legislature was imperatively called for, and the result was the enactment in the year 1882 of the Transfer of Property Act (Act IV of 1882). It would be interesting to note here, the remarks of the Law Commissioners to whom the Act was referred for opinion. "The principles" wrote the Law Commissioners "which we attempt to introduce in our legislation should be comparatively few, carefully chosen and throughly approved. They be cast in a form so far as possible resembling that of rules already accepted or appearing as the logical outcome of already recognised doctrines. The new law would thus link itself naturally to the law previously existing, blend with it imperceptibly,

1. Act XI of 1855.
2. 8 Cal 583.

and form a basis for a new departure. It is the characteristic of sound and fruitful principles to embrace an overwidening mass of details within their operation: contradictory rules and reasoning are either modified or would perish before them. These principles, which in themselves are consistent with the elementary facts of human nature are sure, as matters progress, to be recognised as the proper complement of others already accepted. Thus, from step to step a logically organised system is formed which by a process going on, is moulded insensibly to a development in which the maximum of its beneficial energy can be put forth in the manifold lines of activit, which the law leaves invitingly open in every direction consistent with the common welfare." [4]

Thus the principles, which actuated the Law Commissioners, were to see that the existing laws and usages of the country should be retained as far as possible and their insufficiency might be filled up by such principles of English law as would fit in with the changed conditions and circumstances of the country without being repugnant to them. The Transfer of Property Act therefore embodied the existing rules of the country along with the principles derived from English law, whenever found suitable. The guiding principle of the authors of the Act can be expressed in the following enigmatical words of Macaulay, when framing the Indian Penal Code, namely :—"Our principle is simply this—uniformity when you can have it, diversity you must have it but in all cases certainty."

The Transfer of Property Bill was introduced into the Legislative Council in June 1877 and it was

1. Vide Reports, Sec. 20.

referred to in due course to a Select Committee, which in presenting a preliminary report, stated that in revising the Bill they were guided by the three principles, by which the Government of India desired to regulate its policy of codification, namely :—(1) as little change as possible should be made in the existing law, whether established by the legislature or propounded by judicial decisions, (2) no additions were to be made which were not either necessary or clearly expedient and (3) no interference was to be made with regard to contracts fairly made and usages long established.

The law of Fixtures is a branch of the law of Transfer of Property ; so now-a-days, questions of Fixtures are mainly governed by the Transfer of Property Act. As questions of Fixtures arise often in the case of landlord and tenant, the law of Fixtures is also sometimes regulated in Bengal by the Bengal Tenancy Act and in other provinces by their tenancy laws. Questions of Fixtures sometimes arise between co-parcenars of joint family, or between co-sharers living separately, as well as between a person, having a limited interest and his reversioner or remainderman and in these cases, on the grounds stated above, cases are decided according to the principles of Hindu or Mahomedan Law or some such law of the parties as the case may be.

CHAPTER III.

The Law Relating To Fixtures In British India.

General Principles.

The word Fixture is nowhere defined in any of the Acts. Section 3 of the Transfer of Property Act defines the expression "attached to the earth." Section 8 lays down that all things attached to the earth on transfer pass with the earth. Again the meaning of the expression "attached to the earth" is given as (a) rooted in the earth, (b) imbedded in the earth and (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is so attached. Now reading the two sections together, it follows that things attached to the earth pass along with the earth where the property is land to the transferee on a transfer of the said property. In this respect it closely resembles the English law of Fixtures. There the law is based on the maxim "Quick quid plantatur solo solo cedit" which means that which is annexed to the soil passes with the soil. The movables, thus being attached, become part and parcel of the soil and are subjected to the same rights of the property as the soil itself. These are called Fixtures. The expression rooted to the earth is illustrated in the Transfer of Property Act by the example of trees and shrubs. In that Act, standing timber, growing crops or grass are excluded from the category of immovable property. The expression "imbedded in the earth" is illustrated by buildings and walls. The third clause means and includes things which are attached to imbedded things for the permanent beneficial enjoyment of that to which it is so attached. The expression "immovable property" is defined in the General

Clauses Act as including land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." [1] And although the expression "immovable property" has been given wider meaning in several other acts according to which it includes, besides those mentioned above, buildings, standing crops as well as things attached to the earth, these are expressedly excluded from the category of immovable property and are declared to be movable by the Transfer of Property Act.[2] Therefore it may be said that *things* which are stated to be attached to the earth are under the Transfer of Property Act all movable properties. It follows therefore, that under section 8 of the Transfer of Property Act, movable properties, attached to the earth, lose their character as movables and pass with the earth on transfer, being merged with the immovable property, namely the earth, according to the law relating to immovable property. Fixture therefore means and includes a thing, which being attached to the earth, loses its character as movable property and becomes a part and parcel of the immovable property.

The meaning of the word Fixture as given in the Transfer of Property Act thus presents a striking resemblance to what is meant by the word Fixture in England. There Fixture denotes an article of a chattel nature, permanently annexed to the realty whereby the article loses its chattel character and becomes merged with the realty. The law of Real property then applies to such articles and it goes with the realty according to that law. The Transfer

1. Vide Sec. 3 (25) Act 10 of 1897.
2. Vide Raj Chandra Bose V. Dharma Chandra Bose, 8 B. I. L. 510.

of Property Act provides that a thing, originally movable, if attached to the immovable property, for example, the land, goes with the land on transfer and thereby becomes the property of the person owning the land. It is then no longer considered as a separate movable property but becomes a part and parcel of the immovable property. The principle underlying the above law of Fixtures is based on the well-known legal maxim "Quic quid plantatur solo solocedit" which in its turn is based upon the acknowledged notion of superiority of land over movable properties. Or, in other words the owner of the land gets a preference over the owners of the movable properties. Therefore if a person attaches his movable thing with the land belonging to another, the owner of the land becomes also the owner of the attachment as accession to his property. In England, as has been already pointed out, this principle owes its origin to its peculiar law of Real property and also to its complicated mode of alienation. India being essentially an agricultural country, great value is naturally attached to the land. The owner of the land therefore gets a precedence over the owner of the movable property from days of yore. The law of Fixture as laid down in the Transfer of Property Act is thus in consonance with the existing law of the country, as well as the law prevailing in England. It is therefore in harmony with the principle enunciated by the authors of the Transfer of Property Act when drafting the said code. The authors of the Act, it may be remarked here, as soon as they were satisfied, that the law they intended to codify was in consonance with the existing law of the country, proceeded to examine the English law on the subject and on examining the English law they found it

similar and suitable to the law of this country and then they readily adopted it with certain modifications as the basic principle of the law of Fixtures in British India.

The Indian law or rather the law of Fixtures as embodied in section 8 of the Transfer of Property is more or less derived from some of the provisions of the English Conveyancing and Law of Property Act of 1881. It would be interesting here to set forth the provisions of section 6 of the said Act, as it would then appear that it closely conforms to the provisions of Fixtures in the Transfer of Property Act. Section 3 of the Conveyancing Act runs as follows [1] :—

"(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part and parcel of or appurtenant to the land, or any part thereof."

(2) "A conveyance of land, having houses, or other buildings thereon shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses or other buildings, all out houses, erections, fixtures, cellars, areas, courts, court yards cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liabilities, privileges, easements, rights and advantages, whatsoever, appertaining or

1. Vide The English Conveyancing and Law of Property Act of 1881.

reputed to appertain to the land, houses or other buildings conveyed or any of them or any part thereof or at the time of conveyance demised, occupied or enjoyed with or reputed or known as part and parcel of or appurtenant to the land, houses or other buildings conveyed, or any of them or any part thereof."

We have already noticed that in order to constitute fixture, a thing must be attached to the earth. The mode of annexation is indicated in Section 3 of the Transfer of Property Act, according to which a thing must be (1) rooted to the earth, (2) embedded in the earth (3) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is so attached. It is clear, therefore, that mere physical attachment is not sufficient to constitute fixture, as has been pointed out in the Full Bench case of Thakur Chandra Pramanik [1] even before the passing of the T.P. Act and under the T.P. Act it is needless to state over again that unless the attachment is made according as above, it does not constitute fixture. [2]

The English law is also exactly similar on the point, wherein it is stated that mere juxtaposition is not sufficient to constitute fixtures, but something more is required and the "soil to which it is annexed must be displaced for the purpose of receiving the thing or the thing annexed should be cemented or otherwise fastened to some fabric previously annexed to the soil." [3]

The illustrations given in Section 3 of the Transfer

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1. Ibid, 6 W. R. 228 (F. B.)

2. Compare also the Germanic law, Vide Huebner's Germanic Private Law, pages 176-177 (Supra.)

3. Vide Bain V. Brand, 1 App 762, 772; Turner V. Cameron, 5 Q. B. 306, 311.

of Property Act also make it clear that the attachment must be of a permanent nature. The English law goes further, for according to it, not only the mode of annexation but also the intention of the party and the object and purpose of annexation are the determining factors of a fixture. The Indian law, however, enumerates the modes of attachment and the illustrations to clauses (a) and (b) leave no room for intention but with regard to clause (c) it may be said that it closely resembles the English law and intention as well as the object and purpose of attachment are necessary ingredients of Fixture. Thus if a tree is rooted to the earth it becomes a fixture despite the intention of the planter to the contrary. So a tenant planting trees on his holding acquires no right to sell or otherwise dispose of them unless by custom or contract he acquires a greater right therein. [1]

In a Bombay case a certain matwali of the shrine planted fruit-trees on the land belonging to the shrine. The creditor of the matwali sought to attach the tree in execution of a money decree against the matwali. It was there held that he could not do so. Their Lordships observed that although the matwali planted the trees, he could not acquire any property in the trees and the right of ownership in the trees belonged to the shrine. [2]

An exception is, however, made in favour of agricultural and vegetable products which are more commonly known as shrubs and emblements. These products, which are generally the outturns of annual agricultural labour, are never considered as fixtures however much they may be rooted to the earth.

1. 10 All 159 ; 21 All 297 ; 23 All 211 ; 22 Cal 742.
2. See the case of Nurbibi V. Maganlal, 16 Bom 547.

These products therefore can always be removed by the person, who sows or plants them. [1] The English law on this point is also similar. There the market gardeners and nurserymen are always entitled to remove not only the shrubs and emblements, but also the glass-houses and green-houses erected for their preservation and conservation. [2]

The second mode of attachment is indicated in Clause 2 of Section 3 and is illustrated by the case of buildings and walls. There it is laid down, that if a thing is imbedded in the earth it becomes attached to the earth. Then by operation of section 8, it passes along with the earth to the transferce no matter by whom it is so attached. It follows therefore, that when a wall or a building is embedded in the soil permanently, so that its removal cannot be effected without impairing or materially altering the condition of soil, it becomes a fixture and cannot be removed by the person building it The English law is also similar in this respect, so much so that it may be said that the Indian law is an authoritative reproduction of the English law, which is based on the maxim "Omne quod solo inaedificatur solo solo cedit."

In India, however, instances are innumerable where a person under a defective title, builds on another person's land or makes improvement thereon in the bonafide belief that he can do so under the law. Strictly speaking, if the said improvement becomes a fixture, then he cannot remove it with what-

1. Compare in this connection the views of Narada, when he says that a person, if not a trespasser, is entitled to remove his fixtures at the time of his removal. Vide Bibliotheca Indica, Parasara Smriti, Vol III, p 236.

2. Vide Syme V. Harvey, 24 D 204 ; Mears V. Callendar, 2 ch. 388 ; Penton V. Robart, 2 East 88.

ever object he might make the improvement. Sections 3 and 8 taken together make it clear that it would enure for the benefit of the owner of the land and on transfer would pass with the land. Had these two sections been the only sections in the Transfer of Property Act, it could have been said that the English principle of fixture with regard to buildings is applicable to India in its entirety. But those two sections have been greatly modified by section 51 of the said Act which makes a relaxation in favour of improvements made by bonafide holders under defective titles. It is laid down there that a bonafide holder under a defective title, if making improvements on the immovable property is entitled either to compensation, or to a purchase of the real owner's interest in the property.

The third mode of attachment contemplates annexation to what is imbedded in the earth for the permanent beneficial enjoyment of that to which it is attached. It is clear, therefore, that when a thing is not permanently annexed, but is attached only for ornamental or convenient use it does not become a Fixture and is removable by the person annexing it. Thus window blinds, shutters, chimneys, tapestry and pier glasses, electric fans and lights and sign-boards are never treated as permanent fixtures and are always removable by the person annexing them. The Indian law here closely follows the English law which makes a similar exception in favour of things not permanently annexed to the freehold.

These annexations are what is in English law called direct annexation. There is another class of fixture which is in English law called constructive fixture, that is to say, which becomes a Fixture by the construction of law, as for example, locks and

keys, doors and windows, although not physically attached, are considered as fixture by the construction of law. The Indian law is more explicit on the point and it is laid down that on a transfer by a house, the easements annexed thereto, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith shall pass with the property. [1]

The question may here arise as to whether the object and purpose of attachment has any scope in the law of Fixtures in India. In England it has already been observed in a preceding chapter that the object and purpose of attachment plays an important part in the determination as to whether a particular thing is a fixture or not. From the mode of attachment discussed here, it may be noted that so far as the Indian law is concerned, if a thing is rooted to the earth or embedded in the earth, it becomes a fixture and the object and the purpose of attachment is of very little consequence. But in other cases, where the attachment is made to another thing which is embedded in the earth, the question whether it is or is not fixture would be determined according to the object and purpose of attachment. If the thing so attached is for the permanent beneficial enjoyment of that to which it is attached, it becomes a fixture ; but if the attachment is made for a temporary use or for domestic utility or convenience it does not become a fixture even if it is attached for the beneficial enjoyment of the thing annexed. Or in other words, to constitute a fixture under this head, the attachment must be (1) permanent in nature and (2) for the beneficial enjoyment of the principal. The fixture of

1. Vide Section 8 of the Transfer of Property Act.

this type is generally known as accessory things. Thus a pucca verandah of a house supported on posts fixed to the ground is a permanent structure and is used for the beneficial enjoyment of the house, as such it is irremovable separately from the house. Doors and windows when permanently attached to the house and being necessary for the permanent beneficial enjoyment cannot be detached from the house. It is clear from these illustrations, that the object of attachment must be for the beneficial enjoyment of the principal. It may be said here that the questions relating to the object and purpose of attachment are questions of evidence and each case is decided on its own merits.

Thus to constitute Fixture according to the Transfer of Property Act, a thing must be attached to the earth permanently, so that the thing loses its character as movable and becomes a part and percel of the immovable and is so rooted with the immovable property that its removal cannot be effected without impairing or materially altering the condition of the soil i. e. the immovable property.

Thus for the research of the law of fixtures in India, two subjects at once arise for query, namely—(a) whether a particular article is a fixture and (b) if it is so, whether it can be legally removed by the person annexing it, without being liable for waste. Therefore the rights to fixture and their removal constitute the whole law of fixture and those questions would arise principally between the landlord and tenant, having a permanent or limited interest, as well as between vendor and purchaser, mortgagor and mortgagee, lessor and lessee.

It has already been noticed that in England the

law of Fixtures is divided into two principal classes, namely :—Trade fixture and Agricultural fixture. Trade fixture is a very important branch of the whole law of English Fixtures and the law has considerably developed from the authoritative decisions on that branch. In India owing to a paucity of more developed and modern form of trade, the questions of trade fixture seldom arise for judicial determination and the questions of fixtures, therefore, are principally confined to what is known as agricultural fixture and fixture for domestic use. Cases relating to fixtures often arise here in India with regard to buildings for (1) domestic use, (2) agricultural purpose and with regard to (3) improvements made on the building by a person under defective titles. It may be stated here that complications often arise in those cases in respect of (a) sale, (b) mortgage and (c) lease of those buildings. Another question of fixture is fast developing, having regard to the expansion of trade and commerce and that is with regard to (d) fixtures arising out of a hire-purchase system. And although there is no decision with regard to the last mentioned class of fixture, it is probable that it would form the subject of judicial determination in near future, in view of the rapid growth and popularity of the system.

CHAPTER IV.

Removability Of Fixtures

General remarks :—

It has been observed in the preceding chapter that the rights of removal of fixtures constitute an important subject in the law of Fixtures. It has also been observed that the said rights principally arise between landlord and tenant, vendor and purchaser, mortgagor and mortgagee and lessor and the lessee. We have also noticed that under the English law irremovability of fixtures is the rule and their removal is granted as exception. And these exceptions were first made in favour of trade and then were extended to fixtures for domestic and ornamental use. As regards the agricultural fixtures the inflexible rule of irremovability was scrupulously resorted to and excepting several statutory provisions embodied in the Agricultural Holdings Acts, the rule of irremovability still holds good. In India, however, as has been already said, there is no clear distinction between the agricultural and trade fixtures, so far, of course, their removal is concerned, although, in view of the provisions in clause 3 of section 3 of the Transfer of Property Act, it may be said that the relaxations have been made in the statute in favour of those fixtures, which are not attached for the permanent and beneficial enjoyment of that to which they are so attached. It follows therefore that the tenant would be allowed to remove his fixtures at the expiry of his tenancy, when the fixture is made for a temporary use, be it for the purpose of his trade, agriculture or for domestic or ornamental use.

When dealing with the question of removal of

fixtures in India we are confronted by two things, namely (a) absence of a systematic common law as prevailing in England and (b) absence of a complete codified law on the subject. In order therefore to write out a treatise on the law of Fixtures and their removal, one has to search for his materials in the old customs of the country as well as in the decisions on the subject which are commonly known as Judge-made laws. Besides these, the statutory provisions in the Transfer of Property Act, Tenancy Acts and the Mesne Profits and Improvement Acts as well as the Shastric expositions on the subject as embodied in the Hindu law and the mandates of Koran as found in the Mahammedan law would afford some materials for a research of the law relating to the removal of Fixtures in India.

When dealing with the rights of removal of Fixtures, as between the landlord and tenant in the light of the law referred to above, it may be said generally that having regard to the rule that whatever is affixed to the soil passes with soil, the owner of the soil or the landlord gets the advantage of the fixtures and the tenant has no right ro remove the fixtures since he has no right to the soil. But in view of the fact that the maxim "Quic quid plantatur solo solo cedit" has got no application or only a limited application in India,[1] the tenant's right of removal is often conceded to by the principles of justice and equity as well as by the customary laws of the country. The object and purpose of attachment and the intention of the parties are often taken into consideration in deciding those questions between the landlord and tenant. The nature of the tenancy and the tenant's

1. Vide the dictum of Sir Barnes Peacock in Thakur Chandra Pramanik's case, 6 W.R. 228 (F. B.)

rights threreto are also necessary ingredients for the determination of those questions.

In India four classes of cases generally arise, namely, the questions of removal (a) with regard to trees, (b) with regard to buildings, (c) with regard to things for domestic and ornamental use and (d) with regard to improvements made by persons under defective titles

We have seen that trees when rooted in the earth become fixtures under the Transfer of Property Act and on transfer pass with land. It follows therefore, that ordinarily he who becomes the owner of the land becomes also the owner of the fixtures attached to the land. Up to this it closely follows the English law based on the maxim "Quic quid plantatur solo solo cedit". In India, however, the general principles of English law have been modified to a certain extent by the customary laws of the country, which sometimes even override the provisions of sections 3 and 8 of the Transfer of Property Act. Moreover Section 51 of the T. P. Act makes a relaxation in favour of persons under defective titles making fixtures upon other's lands in the bonafide belief that they are entitled to do so and which eventually improve the character of the soil. These are recognised as improvements both under the T. P. Act as well as under the Bengal Tenancy Act. There it is laid down that in some cases the persons making fixtures by way of improvements would be allowed to remove them, if they do not impair the condition of the soil, while in other cases where their removal cannot be effected without impairing the condition of the soil, the persons making the improvements would be allowed compensation. It may be noted, however, that the relaxation referred to above, is only made in favour

of a person holding the land lawfully and making fixtures under a bonafide, though mistaken belief that he is entitled to make the fixtures. Thus if a mere trespasser makes the improvement on the land of another without his knowledge and consent, the trespasser would have no claim either for removal or for compensation. This principle has been a recognised principle of law even from the days of Manu and Narada, where also a distinction as to the rights of removal was made between a person lawfully holding the land and a trespasser. It has also been held in Thakur Pramanick's case[1] that in India mere accident of attachment does not make the thing irremovable and the maxim "Quic quid plantatur solo solo cedit" has got only a limited application in India

From the aforesaid principles, the law as to removal of fixtures may be deduced as follows :—

(1) When a tenant not having a permanent interest, for example, an occupancy raiyot or a tenant-at-will, plants trees on his holding, the property in those trees in the absence of any custom or contract to the contrary, attaches to the land and the tenant has no right to remove the trees in any way. [2]

(2) But a tenant at fixed rates or a tenant under Mokarari rights and thus having a transferable interest in the holding would be allowed to remove the trees by way of sale, gift or otherwise and the superior landlord shall have no right to prevent the removal by the tenant. [3]

(3) If a person, in possession under a lawful though limited title, for example, an occupancy raiyot

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1. 6, W. R. 228 (F. B.)
2. 4 All 174 ; 10 All 159 ; 23 All 211.
3. 1 A. W. N 20 ; 23 All 211.

or a tenant at fixed rates or a tenant from year to year or of uncertain duration, plants trees or erects permanent structures or otherwise makes by way of fixtures, some improvements in the land with the knowledge and express or implied consent of the landlord, the tenant, at the termination of his tenancy would either be allowed to remove them or be allowed compensation for the improvements. [1]

(4) In the case of a pure trespasser, any fixtures made by him and thereby improving the soil, the fixtures would pass with the land and the trespasser would not be allowed either to remove them or be allowed any compensation. [2]

Having thus stated the general principles of removal with regard to trees, let us see how far these have been given effect to by judicial decisions. It may be noted here that the decisions go to show that excepting a tenant having a permanent, heritable and transferable interest, no tenant has any right to the trees in the holding and he acquires no right of removal, even if they are planted by him. Thus in an early case it is laid down that where a cultivator plants trees on the lands in his possession, the trees go to the landlord after the cultivator had ceased to cultivate. [3] In another Allahabad case it has been held that where a tenant with a right of occupancy plants trees and builds huts on a portion of his holding, his whole occupancy right would be forfeited. [4] It may be noted however that those cases were decided before the Transfer of Property Act came into operation but the principles enunciated in those cases were

1. 23 All 126.
2. Vide Narada Samhita (Ibid).
3. Jhagaru V. Shamshere Khan,—1 A. W. N. 20 (1881)
4. Bholai V. the Raja of Bansi, 4 All 174.

approved in later cases and is still regarded as good law. Thus the case of Imdad Khatun and others V. Bhagirath, [1] the same principle was laid down more clearly. It was there held that the trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such holding, and like it are not susceptible of transfer by the tenant. In a later Allahabad case, [2] the law laid down in the above case was approved and followed. In that case R, an occupancy tenant planted certain trees on his occupancy holding. He mortgaged those trees in 1885 to S. Subsequent to the mortgage, R relinquished his tenancy, and the holding was taken possession of by the Zemindars. Then under a decree on R's mortgage, the trees were put up to auction and purchased by A. After this, the land upon which the trees stood was taken up for public purposes and a sum of Rs. 76-8- was paid as compensation in respect of the trees. This sum was realised by the Zemindars, and thereupon the auction purchaser A sued the Zemindars for the recovery of the said sum. It was held that the tenant could not sell or otherwise transfer those trees. Their Lordships (Knox and Burkitt JJ.) reviewed all the Allahabad cases on the point, namely Ajudhia nath V. Sital; Imdad Khatun and others *vs.* Bhagirath referred to above, as well as the case of Kausalia V. Gulabkunwar, [3] and laid down the law as follows :—

When a tenant, either occupancy or tenant-at-will, plants trees on his holding, the property in those trees,

1. 10 All 159.
2. Janaki and another V. Shesadhar, 23 All 211.
3. Ajudhia Nath V. Sital, 3 All 567., Imdad Khatun and others V. Bhagirath, 10 All, 159, Kausalia V. Gulab, 21 All 297.

in the absence of a custom or contract to the contrary, attaches to the land and the tenant has no power of selling or otherwise transferring those trees.

In Bengal the general principles of fixtures with regard to cutting down trees by an occupancy raiyot has been much modified by section 23 of the Bengal Tenancy Act, the concluding portion of which runs as follows :—

"When a raiyot has a right of occupancy in respect of any land .... (he) shall not be entitled to cut down trees in contravention of any local custom."

The law stated there was interpreted in the case of Nafar Chandra Pal Chaudhuri V. Ramlal Pal. [1] The law as enunciated by their Lordships (Beverley and Hill JJ.) is that the property in trees growing on land is by the general law, vested in the proprietor of land, subject of course to any custom to the contrary. Under Section 23 of the Bengal Tenancy Act, the onus is on the landlord to show that an occupancy raiyot is debarred from cutting down trees on the land. *The right to appropriate them when cut down, however, is a different question.* The onus of proving a custom giving the tenant a right to appropriate the trees is on the tenant. In delivering judgment Mr. Justice Hill reviewed the earlier decisions beginning with the case of Kenny V. Amiruddin Mandal decided by the Sudder Dewani Adalat in 1862 [2] as well as the cases of Ruttanjee Eduljee V. Collector of Thanna. [3] The Allahabad cases cited above were also discussed and approved. The principles laid

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1. 22 Cal. 742.
2. Sutherland's Reports, S. C. C. Ref. 14.
3. 11 M. I. A. 295.

down in the case of Nafur Chandra Pal Chaudhuri cited above were followed in 23 Cal 854.

The principle enunciated by Mr. Justice Knox in the case of Janki and another V. Sheoadhar [1] cited above was also in consonance with the Bombay decision. In the case of Nurbibi V. Maganlal [2] commonly known as, the Matwali case where a Matwali planted trees on the land, belonging to the shrine, it was held that the Matwali could not acquire any property in the trees, and the right of ownership in the trees belonged to the shrine.

In Madras, the question arose as to whether a Kanomdar in Malabar was entitled to cut down and remove the trees planted by him in the holding occupied during the term of his tenancy. The matter came up for decision before the Full Bench of the Madras High Court, where it was held that he could do so, provided that he left the property substantially in the state in which he received it.[3]

The case of Nafar Chandra Pal Chaudhuri Versus Ramlal Pal, [4] was discussed by their Lordships of the Full Bench but was distinguished on the ground that the Calcutta case was based on the terms of the Bengal Tenancy Act, and as such it could not be regarded as an authority applicable to Kanomdars in Malabar. It may be remarked here, that the decision of the Full Bench rested more or less on the local laws applicable to Malabar and so it can not be said on the authority of the Full Bench case, that an occupancy raiyot is entitled to remove trees

1. 23 All. 211.
2. 16 Bom. 547.
3. Vasudevan Nambudripad V. Valiachathu Acharu and others. 24 Mad 47.
4. 22 Cal 742.

from the holding occupied by him. On the contrary, on the authority of the decisions in High Courts of Allahabad, Calcutta and Bombay it may be said, that the property in the trees vests in the landlord, as such a tenant having a limited interest has no right to remove them.

But different are the cases of tenants at fixed rates and tenants having permanent rights. There the tenants are undoubtedly at liberty to cut down and remove trees planted by them. The principle underlying the above distinction is clear and is based on the general law of fixtures, namely, that the trees affixed to the soil pass with the soil. The tenant at fixed rent or a tenant having a permanent, heritable and transferable interest, is the absolute owner of the land, and as such can alter the condition of the soil in any way he likes. This principle has been laid down in the case of Harbanslal versus Maharaja of Benares.[1] There the plaintiff, a tenant at fixed rates, sued for a declaration of his right to three tamarind trees that stood in the holding. The question arose as to who, the landlord or the tenant, would be entitled to the trees. It was held that the tenant being a tenant-at-fixed rates was the owner of the holding and as such, the trees would belong to him. In delivering judgment, Aikman J. (decided by Banerjea and Aikman JJ.) observed "I am unable to agree with the proposition laid down by the Subordinate Judge that the presumption regarding trees on land held by a tenant at fixed rates is that the trees belong to the landholder. In my judgment, the presumption is the other way. The general rule is that trees go into the land. A tenant at fixed rates

1. 23 All 126.

has a transferable right in the trees thereon and is the owner thereof."

From an analysis of the cases cited above, it may be said that it has become a settled law, that with regard to the removal of things, rooted in the earth, for example, trees, the ownership having been vested with the landlord, a tenant, having only a limited and temporary interest in the land, cannot remove them. But a tenant having permanent, heritable and transferable interest in the holding is to all intents and purposes deemed to be the owner of the holding, as such he is entitled to remove those fixtures, for example the trees, during the continuance of his tenancy.

REMOVAL OF BUILDINGS.

Great complications often arise here in India with regard to the question of removal of buildings. It may be noted here that under the T. P. Act, buildings and walls because of their being embedded in the earth become fixtures and under section 8, on transfer pass with the land. It follows, therefore, that if a person erects a building or raises a wall on another person's land, the ownership in that building or wall would vest in the landlord by the operation of Section 8 of the T. P. Act. As has been already indicated, the application of Section 8 is often controlled here by customary laws of the country as well as by sections 51 and 108 of the T. P. Act and by Act XI of 1855 namely, the Mesne Profits and Improvements Act. It happens therefore, that notwithstanding section 8 of the T. P. Act, the tenants erecting buildings and walls are allowed before the expiry of their tenancy to remove those fixtures or in the alternative are allowed compensation. The law in this respect has developed a good deal by the Judge-made laws much more

than any other branch of the law of fixtures in India. It would therefore be interesting to trace its origin and growth before we venture to discuss the present law on the subject.

The earliest reference of this kind of fixture is found in the text of Manu of which reference has already been made before. [1] The question was afterwards more fully discussed by Narada, who drew a distinction between the buildings erected by a tenant and a trespasser and laid down that if a tenant built a house on the land of another and for which he used to pay rent would be entitled at the time of quitting the land to take with him the thatch, the wood and the bricks, but a mere trespasser or a tenant paying no rent would not be entitled to the materials and they would go with the land to the landlord. [2]

The same view was expressed by the authors of the Mahomadan law. Thus in the Hedayah, it is laid down that "if a person hire unoccupied land for the purpose of building or planting, it is lawful, since these are purposes for which land is applied. Afterwards, however, upon the term of the lease expiring, it is incumbent upon the lessee to remove the building or trees, and to restore the land to the lessor in such a state as may leave him no claim upon it. It is in-

1. Vide Introduction.

2. In Huebner's Germanic Private Law, the question of Fixtures with regard to buildings has been exhaustively dealt with. The learned author has started from the medieval law and has compared it with the modern. The following extracts from his book would afford here a comparative study: "Buildings" says Huebner "might stand in the ownership of another than the owner of the land. This principle is doubtless an echo of those primitive conditions in which houses that were not yet firmly attached to the soil were regarded as chattels, and consequently did not constitute component parts of the land.

cumbent on the lessee to remove his trees or houses from the land, unless the proprietor of the soil agrees to pay him an equivalent, in which case the right of property in them devolves to him (still, —however,

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But it maintained itself long beyond that early period. The house that the medieval burgher built upon the plot of land given him in tenancy ("Leihen") by the town lord became the builder's property ; he could sell it, bestow it as a *morgive*, etc Similarly, according to the account of the Sachsenspiegel the wife became owner of the house that was erected upon the husband's land with the timber for house and fence which her husband had given her as her "*morgive*". That the German law, in other respects,—that is where the natural characteristics of the structure were not involved,—treated the building as a component part of the land, thus recognizing as did the Roman law the principle that "Superficies solo cedit," is proved by the law of the proprietary church. These proprietary churches, like all other churches, were bound to have a stone altar firmly attached to the soil, and the lordship of the soil below the altar, the right to the soil, disposed also of the church.

The old rule, derived from the character of primitive wooden buildings and inconsistent with the principle "Superficies solo cedit," maintained itself in some localities after the Reception. It subsisted, for example, rather widely in Switzerland and in Schleswig—Holstein ; was expressly recognized under the Prussian "Landrecht," the Code Civil and the Baden "Landrecht" ; and is not unknown in the English law.

In the same way that the old German law treated cases in which another than the landowner erected a building and acquired the property therein, it treated the closely related cases in which not houses, but other structures and works that were annexed to the soil of another; were involved. The butcher put up shambles on the ground floor of the house he rented ; the brewer buried in or affixed to the walls heavy kettles and pans : evidence of the former exists particularly in Frankfort and Breslcau, of the latter in Lubeck. Nor were these fixtures ("Werke") regarded as component

this cannot be without the consent of the owner of the houses or trees, except where the land is liable to sustain all injury from the removal, in which case the proprietor of the land is at liberty to give an equiva-

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parts, because, unless the building itself was specially devoted to the purposes of that trade, they did not serve the economic ends of the building but the personal ends of the respective craftsman or tradesman, securing to him a permanent use. They were therefore treated, quite in analogy to the primitive wooden houses, as independent pieces of land : they could be mortgaged, conveyed, and entered in the city register ("Stadtbuch") in the name of their owner, and thus made the object of a land rent. The exceptional position which the Civil Code assigns to so-called merely "apparent component parts" ("Scheinbare Bestandteile") must be regarded as a recognition and further development of these growths derived from Germanic law.

From the 1100S onward we already find extremely wide spread in German towns so-called "story" or "Roomage" ownership ("Stockwerks", "Geschoss", "Etageneigentum")—Ownership of the individual stories of a building. Houses were horizontally divided, and the specific parts so created the stories, floors and cellars—were held by different persons in separate ownership ; this being associated ; as a rule, with community ownership of the building site and the portions of the building (walls, stairs, roof etc.) that were used in common. Notwithstanding that this peculiar legal institute was totally irreconcilable with the alien law of the Reception, it remained part of the law,—not, however, of the common customary law, for which reason the Prussian "Landrecht" and the Austrian and the Saxon Codes refused to recognize it.

It was preserved as a particularistic legal institution in many localities, even in the face of statutory prohibitions, especially in Bohemia and South Germany : in Salzburg, Munich, Wurzburg, Regensburg, in Wurttemburg (to a quite extraordinary extent, according to Kuntze's reports, in Wildbad), Sachsen—Meiningell, Frankfort, and above all, with extraordinary vitality and in many cases down to the present day, in Switzerland. It has also been expressly recognized by the Civil Code. A particularly clear example, illustrating

lent and appropriate the trees or houses without the lessee's consent) or unless the proprietor of the land assents to the trees or houses remaining there, in

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the law as it stands to-day, is afforded by the contract concluded in 1901 between the municipality of Freiburg and the Edifice of the Holy Virgin, a cathedral-building endowment at Freiburg, for the purpose of determining the legal relations existing between them ; by which contract it was agreed that the Cathedral, together with the spire, should be registered as the property of the Cathedral-building Endowment ; but, as to the construction plant ("Munster-bauhutte), that the property of the yard and lower story should be registered as in the building-endowment and that of the second storey and roof as in the city ; which was accordingly done.

The Civil Code, however, recognizes the Roman principle according to which fixtures, as component parts of land, necessarily follow the land surface ; and has therefore not recognized independent property in building-stories. The Roman principle applies to entire buildings when they are actually component parts, and so holds also as to their stories. On the other hand, the Civil Code has recognized continuance of property in building-stories existing at the time it became effective. The Swiss Civil Code has taken the same position.

Finally, the medieval law attributed to the products of the soil—trees, grain, fruits—a separate legal existence ; often treating them, even before their severance, as chattels. Another than the owner of the soil might therefore have the right to harvest them. In the state systems, as for example in the Prussian "Landrecht", this view has been preserved. The possibility, not infrequently admitted, of a separate mortgaging of fruits, which has also been recognized in the imperial Code of Civil Procedure was a consequence of the same principle."

Huebner's Germanic Private Law, pages—172—75. .. For the modern German Law on the point, see Introduction (Ibid).

which case they continue to appertain to the lessee and the land to the landlord." [1]

Reference has already been made [2] as to the law relating to the removal of the buildings during the early British administration and before the Transfer of Property Act came into operation. We have noticed there, that there were two sets of law prevailing in India one for Mofussil and the other for Calcutta. While in Calcutta, questions relating to the removal of the buildings were decided according to the principles of the English law, in the Mafussil, the English law was scrupulously avoided and cases were decided according to customary laws of the country and according to the principles of equity and good conscience. There were a series of cases on the question of the removal of the buildings in Mofussil, of which reference has already been made in a previous chapter. [3] The trend of those decision is in favour of removal by a tenant of buildings erected by him on the land of the landlord, during the continuance of his tenancy. The law on the subject was fully discussed and laid down in the case of Thakur Chandra Pramanic versus Ramdhan Bhattacharjee [4] and runs as follows :—"Buildings and other such improvements made on land in the Mufassil do not by mere accident of their attachment to the soil, become the property of the owner of the soil. If he who makes improvement is not a mere trespasser, but is in possession under any bonafide title or claim of title, he is entitled either to remove

1. Hedayah, Hamilton's translation Vol III, page 284; also page 325.
2. Ibid, chapter II.
3. Vide 3 W.R. 71 ; 5 W.R. 108 and 64 W.R. 228 (F. B.)
4. 6 W. R. 228 (F. B)

the materials or to obtain compensation for the value of the building at the option of the owner."

With regard to Calcutta, the earliest reference deciding this point is found in the case of Doyal Chand Laha versus Bhairab Nath Kshetry.[1] In that case, Justice Phear granted an injunction, restraining the defendant who had been in occupation of the premises in Calcutta from removing the materials of additional buildings which he said he had built. In that case, however, the Report does not show under what circumstances the defendant had been in occupation, whether as tenant and if so, to whom or under what title. In the case of Parbati Bewah v. Umatara Debi[2] the question was, whether the tenant of land in Calcutta on which he had erected tiled huts was entitled to remove them. A custom to remove such erections having been proved he was allowed to remove. The next case was the case of Rasik Lall Modak v. Loknath Karmakar.[3]

In that case, the law laid down in the Full Bench case of Thakur Chandra Pramanik was approved and followed. This was a suit by tenant who had been ejected from certain land in Calcutta, the tenant claiming to be allowed to pull down and remove buildings erected thereon by himself or his predecessors in title or in the alternative to be paid compensation for the outlay incurred. It was there held that the tenant could remove the buildings. In the case, however, of Jagat Mohini Dasi v. Dwaraka Nath Basak and others,[4] it was held that the case arising

1. Coryton 117
2. 14 B. L. R 201.
3. 5 Calcutta 681
4. 8 Csl. 582.

in Calcutta, the law to be applied was the English law according to which whatever is fixed to the soil becomes part of it and goes with the soil. In that case at a Sheriff's sale, one Templeton purchased a Hindu widow's interest in certain land in Calcutta ; after passing through several hands, the land was purchased by the defendant. Between the possession of Templeton and the defendant, an intermediate-holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant to recover possession of the house and land. The defendant admitted the plaintiff's claim to possession, but contended that he was entitled to be paid a fair price for the buildings or to remove the materials. It was held that he was neither entitled to compensation nor to remove the materials.

It is clear from the cases discussed, above, that if a tenant bonafide erects a building on the land belonging to his landlord and thereby augments the value of the land, he is entitled before the determination of his tenancy either to remove the materials or to demand compensation from the landlord. The only solitary exception to the principle thus enunciated was the case of Jagat Mohini referred to above. These cases, however, were decided before the T. P. Act came into operation. Let us see how far this principle was adhered to after the passing of the Transfer of Property Act. Buildings and other erections which must be embedded in the earth, according to section 3 of T. P. Act, are attached to the earth, and as such, become fixtures in the contemplation of law. Then by operation of Section 8 of the Transfer of Property Act, they pass with the land on transfer. Or in other words, by the transfer of the land, the

transferee gets also the buildings attached to the land. But since these erections generally augment the value of the land they are deemed to the improvements made on the land. Then the provisions of section 51 of the Transfer of Property Act at once come into operation and thereby section 8 is controlled by section 51. Section 51 of the Transfer of Property Act makes provisions for improvements made by bonafide holders under defective titles and lays down that" if the person under defective titles is subsequently evicted by any person having a better title, the former has a right to require the person causing the eviction, either to have the value of the improvement estimated and paid or secure to the former or to sell the latter's interest in the property to the transferee at the then market value of such improvements." [1]

1. Compare in this connection the German law. Hubner while discussing the rights of a person building in good faith upon another's land, says that under the German law he is entitled to compensation. "This principle," says Huebner, "which was inconsistent with the Roman law ('Superficies solo cedit'), was retained in the territorial systems, and was extended in some of them (the Prussian "Landrecht" and the law of Wurttemberg) by the further rule that a house owner who built upon a boundary in good faith, acquired ownership in the surface of his neighebour's land so over built, subject to compensation for its value. The Civil Code has adopsed this principle along with a peculiar extension ; the owner of the land built upon is obliged to suffer the projecting portion of the building, which remains in the ownership of his neighbour ; but he receives from his neighbour in return damages in the form of a money rent, which is a charge upon his neighbour's land even without registry in the land book. Here again the rule of the Swiss Civil Code is at once simpler and in more exact agreement with the earlier law: whenever a projecting building is erected without right and the injured party, not with standing that this ought to be manifest to him, does not protest in due time, the real right in the building or

Section 2 of the Mesne Profits and Improvements Act [1] makes similar provisions in favour of persons under defective titles making improvements on the land of another. Then again under section 108 Cl (h) of the Transfer of Property Act "the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it." It is clear from this, that the tenants under this section are entitled to remove all their fixtures, subject to the proviso that he leaves the property unaffected. Taking all these sections together, the law with regard to the removal of buildings may be formulated as follows :—A building or a wall when imbedded in the earth becomes a Fixture and as such, ordinarily on transfer pass with the land. Therefore if a tenant erects a building on the holding belonging to the landlord, it becomes the landlord's fixture and so the tenant loses all rights of removal. But if he erects an additional building for the purpose of improving the original building standing on the land or if he raises a new structure and thereby augments the condition of the land in the bonafide mistaken belief that he is the owner thereof and as such entitled to make such improvement, he on being evicted by a person having a better title to the land, can claim compensation for the outlay incurred or can demand of the landlord the land on which the building is raised at the present market value. If the tenant happens to be a lessee

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the ownership of the soil may be assigned to the party so overbuilding. provided he acted in good faith and circumstances otherwise justify, in return for proper compensation to the other party."

—Huebner's Germanic Private Law. page 267.

1. Act XI of 1855.

under a valid lease and erects a building on the demised land, he can remove the materials before the termination of his lease, if such removal does not impair the condition of the soil ; but if it does, then the leasee is entitled to compensation. In those cases the knowledge and consent, express or implied, would be required for urging an equitable estoppel against the landlord. In the absence of course, of the knowledge and consent, express or implied, of the landlord, the tenant can not claim compensation.[1] If the tenant happens to be a lessee under a valid lease and erect a building on the demised land, he can remove the materials before the termination of his lease if such removal does not impair the condition of the soil, but if it does, then the lessee is entitled to compensation.

These principles of law have been well established by a series of decisions on the point. Thus in the case of Ismaikani Rowthan V. Nazarali Saheb and another [2] certain land was leased in 1875 to a tenant for 20 years, it being recited in the lease that the tenant took a lease of the land for constructing a building thereon, for the purpose of trade. A building was erected, and it was contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the lease was entered into. At the expiration of the term the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building, though this had not been removed during the continuance of the lease. It was held that though the tenant could not claim compensation he could remove the building on eviction by the

1. 27 Cal. 570.
2. 27 Mad. 211.

landlord. In deiivering judgment, Mr. Justice Bhasyam Ayangar discussed the Hindu and Mahamedan law on the subject and reviewed the provisions of sections 51 and 108 of the Transfer of Property Act and held that on eviction the tenant is at liberty to remove the building or its materials. In this case the principles laid down in Thakur Chandra Pramanik's case [1] and subsequently followed in the case of Ismail Khan Mahamed V. Jaigun Bibi [2] were approved and followed. In the aforesaid case of Ismail Khan, where a tenant, not having a permanent interest in the holding erected a pucca building on the land without the consent of the landlord, it was held that although the tenant could not claim compensation on eviction he could remove the building or the materials. It may be noted here, that in both these cases, the question directly at issue was not as to the rights of removal by the tenant but as to his rights to claim compensation. It was held in both the cases that no compensation could be allowed in the absence of express or implied consent of the landlord. In the case of Kanai Lal Jalan vs. Rasik Lal Sadhu Khan [3] the tenants' right of removal of the building even after the expiry of the lease was indirectly recognised. In that case A purchased a plot of land at a sale, held in execution of a mortgage decree. In the mortgage suit the plaintiff-mortgagee's case was that the tenant-defendants to that suit had taken their tenancies from the mortgagor after the date of mortgage and the mortgagee prayed for the sale of the property free from the tenancies. The case set up by one of the Respondents, who was the elder brother of the other

1. 6 W. R. 228 (F. B).
2. 27 Cal 570.
3. 19 C. W. N. 361.

Respondents was that they held a permanent tenure created prior to the mortgage which was confirmed by a confirmatory lease after the mortgage and that they had erected a pucca building on the land. Issues were framed on these points and the court found in favour of the plaintiff-mortgagee, and in execution of the mortgaged decree, the property was sold free from all encumbrances and purchased by the appellants. Subsequently a portion of the land so purchased by the appelant was acquired under the Land Acquisition Act and the Respondents put in a claim for the compensation money alleging that they had a permanent mokarari mourashi interest in the land and the tenancy standing in the name of the elder brother, it was held that the provision of section 108 of the T. P. Act are subject to local usage, and in the present case the leases not being determined by any notice to quit and in the decree on the mortgage suit not having given them an opportunity to remove the building, they should be allowed to remove them, unless A chose to take them on payment of compensation. In delivering judgment, Mr. Justice Fletcher sitting with Mr. Justice N. R. Chatterjee after discussing the cases of Thakur Chandra Pramanik [1] and Ismai Kani Rowthan versus Nazarali Saheb, [2] observed the following :—"It is contended on behalf of the appellant that under section 108 clause (h) of the T P. Act, the right of the tenant to remove Fixtures must be exercised during the continuance of the lease. But the provisions of the Section are subject to local usage. In the case of Ismai Kani Rowthan vs. Nazarali Saheb above referred to, it was pointed out that the section only provides for the tenant removing

1. 6 W. R. 228 (F. B.)
2. 27 Mad. 211.

fixtures during the continuance of the lease, and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have not been already removed by the lessee. The learned Judges observed as follows :—"The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them, and in the absence of any contract on that point, the question will have to be solved with reference to the "local usage, whatever may be the precise sense in which that expression is used in section 108. According to the customary or common law of the land as laid down in the case of Thakur Chandra Pramanik [1] the option in such cases will be with the lessor either to take the building on paying compensation, or if he is unwilling, to pay compensation, to allow the tenant to remove the building." In that case the lessor did not object to the removal of the building, and the only question was, whether the tenant was entitled to compensation and the question was decided against the tenant. But the view taken of the right of the tenant to remove buildings if he has not removed them before the determination of the lease appears to be an equitable one and in accordance with the usages and customs of the country as laid down by the Full Bench in the case of Thakur Chandra Pramanik. The leases in these cases were not determined by any notice to quit, and the decree in the mortgage suit, under which the defendants lost their rights, did not give them any opportunity to remove the buildings. Under the circumstances, we think they should be allowed to remove the buildings (three months' time being allowed for the removal thereof) unless the appellant

1. 6 W. R. 228 (F. B.)

chooses to take the buildings on paying compensation." [1]

It is to be noticed that in the aforesaid case their Lordships gave the tenant an equitable relief against the landlord on the ground that no notice to quit was served upon the tenant. The case, therefore, although is an authority for the proposition that the tenant is entitled to an equitable relief against the landlord in cases where the tenancy is not expressly determined, does not say anything as to whether the tenant would be allowed to remove the materials in the case when he fails to remove the materials before the determination of the tenancy. Ordinarily after the expiry of the tenancy the tenant forfeits his rights of removal unless he can do so by local usage by express contract. [2]

A question arises in this connection as to whether in all cases where a tenant erects a permanent structure upon the land let out to him in the knowledge of and without the interference of the landlord, the landlord would be estopped from suing the tenant for ejectment. The leading case on the subject is the well-known case of Lala Beni Ram Vs. Kundan Lal.[3] It was there held by their

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1. Vide 19 C. W. N —361 at page 365. Per Fletcher, J.

2. An interesting question as to whether the rights in a fixture to wit a building standing on the land of another passes to the purchaser at a revenue sale was raised in a very recent ease of the Privy Council. It was held that the ownership of the building did not pass to the purchaser by reason of the revenue sale. It may be noted here that in this case the dictum of Sir Barnes Peacock C. J. in Thakur Pramanik's case (6 W. R 228. F B) was approved and followed:—
Vide 46 C. L. J. 1 per Sir Lancelot Sanderson, K. C.

3. 26 I. A. 58.

Lordships of the Judicial Committee [1] that the landlord or the lessor is not estopped in equity from bringing ejectment by reason of the tenant having erected permanent structure upon the land leased out in the knowledge and without interference by the landlord or the lessor as the case may be. The proposition of the law thus laid down by the Judicial Committee is based on the principles of the well-known case of Ramsden vs. Dyson and Thornton, [2] which is still regarded as the leading authority of the law of England upon the point.

It would be interesting here to quote the following observations of Lord Watson who delivered the judgment, as it at once clearly indicates the principles involved in the question of estoppel raised in these cases. In the course of the judgment, his Lordship observed "The proposition.....(of estoppel) might possibly be made to apply to the case where the owner of the land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected. The Respondents knew that the predecessors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants upon the terms and for the period provided by the lease. In order to raise the equitable estoppel.....against the appellants.....it was incumbent upon the Respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to

1. Decided by Lord Watson, Lord Hobhouse, and Sir Richard Couch.

2. L. R. 1 H. L. 129.

justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.....

If there be one point settled in the equity law of England, it is that the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter. It must also be kept in view that in Indian law, the maxim "quic quid plantatur solo solo cedit" has no application to the present case. The rule established in India is that of section 108 of the T. P. Act which provides that "the lessee may remove at any time during the continuance of the lease, all things which he has attached to the earth, provided he leaves the property in the state in which he received it." [1]

These cases unmistakably show that the questions relating to the rights of removal of the buildings are decided on the collective basis of the following stand-points, namely :—(1) Express statutory provisions as embodied in the T. P. Act and the tenancy laws of the country as well as other statutes [2] as the case may be. (2) Local usage and (3) Principles of equity and good conscience The result arrived thereby, as has been noticed before, is often different from the law as laid down in any of the above. One thing is however remarkable and that is the tendency of the Indian Courts to decide the questions without being influenced by the principles of English law on the

1. See Page 63, in 26. I. A. 58.
2. Vide Act XI of 1855.

subject. Undoubtedly the Indian Courts have started in this respect from a right perspective, for if English principles are incorporated in toto into the Indian system, the result would be simply disastrous. The habits and customs of the people of the two countries being different as poles assunder, it is wise and politic that the system of the one should not be blended with the other. It is from this standpoint that the courts in India have repeated in times without number that the English maxim of fixtures namely, "Quic quid plantatur solo solo cedit" has only a limited application in India. This has been voiced forth as early as in the days of Sir Barnes Peacock in 1866 in the well-known case of Thakur Ch. Pramanik and this has been echoed and re-echoed in a series of decisions and has even been repeated by their Lordships beyond the seas, as Sir Lancelot Sanderson now of the Privy Council in a very recent case [1] has observed that "in India the maxim in English law, namely. "Quic quid plantatur solo solo cedit" has at the most only a limited application."

The difference between the two laws has also been pointed out by Sir Lawrence Jenkins when he says that "the word Fixture is one of common use in English law but in India the word is not so familiar, and the maxim "Quic quid plantatur solo solo cedit" on which the law of England seems to have been originally founded, has never received so wide an application here as there.[2] "

It is clear from the above that there is a good deal of difference between the English and Indian

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1. Narayandas Kshetry Versus Jatindra Nath Roy Choudhury and others 46 C. L. J. I.

1. Vide the case of Chaturbhuj Vs. Bennett 29 Bom. Page 323, at Page 343.

law of Fixtures and nowhere is the difference so marked as in the case of the removal of the buildings. As has been noticed before, the reason is clear and simple as the two systems have proceeded from different standpoints. It happens, therefore, that although buildings erected on another person's land enure ordinarily under the English law for the benefit of the landlord, in India though compensation is not always allowed, the rights of removal of the buildings have generally been conceded, so much so, that equitable estoppel is often urged against the landlord if he questions the tenant's right of removal, although, of course, the landlord's right of ejectment has been fully recognised."[1]

Removal of Fixtures for ornamental and domestic use. :—

It has been observed in a previous chapter [2] that in England the law with regard to the removal of trade fixtures applies mutatis mutandis to the removal of fixtures for domestic and ornamental use. It has also been observed [3] that the old common law of irremovability of this class of fixtures was reiterated in Harlakenden's case [4] and that the rights of removal by the executor against the heir or by the tenant against the landlord were first recognised in the case of Squier v. Mayor [5] and it was subsequently approved by Lord Mansfield in Lawton v. Salmon [6] and afterwards by Lord Ellenbo-rough in Elwes v. Maw.[7] From the authorities cited above, the law on

1. Vide Lala Beniram V. Kundanla. 26 I. A. 58.
2. Vide Chapter I.
3. Infra.
4. 4 Co. Rep. 62 a.
5. 2 Freem 249.
6. 3 Atk 16.
7. 3 East 54.

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6. 3 Atk 16.
7. 3 East 54.

the subject has been established in England that a tenant is entitled to remove the things which he has affixed to the demised premises for ornamental or domestic purposes, provided he leaves the freehold in the same state in which the tenant first entered. If, however, for the removal of the said fixtures some damage is done to the building or to the freehold, which is considered to be unavoidable, compensation may be allowed to the landlord for such damage.

Indian law.—Having thus stated the English law, let us see how far this is applicable to India. It may be remarked at the outset that there is no express provision in any of the statutes in India with regard to this class of fixtures. For anything to be a fixture, it must be attached to the earth according to the modes indicated in section 3 of the Transfer of Property Act. It may be contended, however, that these things are attached to something already attached, for the permanent beneficial enjoyment of that to which it is attached. Let us see how far this contention is sound. The test is whether these things are fixed for the permanent beneficial enjoyment of the principal of which it may be regarded as accessory. In order to determine that, let us enumerate the articles which are commonly used for domestic or ornamental use. In India this class of Fixtures, if they are really so, is generally found in large cities like Calcutta, Bombay etc., where the houses are generally of substantial nature, and the mode of living is almost on a par with that of England. Thus electric and gas fittings, wall paintings, pictures nailed to the walls, tower clocks fixed up at the top of the house, almirahs and shelves fixed with the house as is generally seen in dispensaries and libraries are common illustrations of what is called in England ornamental Fixtures. Gas

stoves, furnaces attached to the earth, marble and stone slabs affixed to the wall of the building for advertisement, dyers and washerman's vats, chimneys attached to the building for the outlet of smokes, pipes nailed to the walls are some of the common cases of domestic Fixtures. The question arises at once, whether these things are used for the temporary use or convenience of the occupier, or they are for the permanent beneficial enjoyment of the principal. The nature of the things clearly indicates that they are for temporary use and convenience of the occupier, as such they are not Fixtures in the true sense of the term. The mere fact that they are affixed to the earth or the building does not change their character as personal chattels.

In England, anything which is fixed to the soil becomes under the common law a Fixture. Even there, the things enumerated above are often excluded from the category of fixtures, and even when they are otherwise, they are held to be removable.[1] The principle underlying these is that annexations of this nature are generally made for temporary purposes only, and so it would greatly incommode tenants in the enjoyment of the demised estate if by slight attachment the character of the property is immediately changed. And in the case of domestic Fixture, the personal nature of the property is generally recognised and hence they are always held to be removable. [2]

In India the law of Fixtures, as has been already stated is never so rigid as in England. So if the things, attached for domestic and ornamental use are removable even in England, it is beyond question that

1. Infra.
2. Vide Amos and Ferard on Fixtures, pages 77 and 78, Ist Edn.

they are so in India. Moreover Section 108 of the T. P. Act is exhaustive enough to include things of this description. Therefore it may be said that this class of Fixture is removable by the tenant during the continuance of his lease provided he leaves the estate in the same state in which he entered it.

TRADE FIXTURES —THEIR REMOVAL.

It has been observed before that the subject of trade fixtures forms an important part in the English law of Fixtures. It has also been stated that in England the relaxations of the old common law of irremovability of fixtures were first made in favour of trade, [1] so much so, that one might think that, but for the Industrial Revolution in England and the advancement of trade and commerce, the law of Fixtures would have remained where it stood under the common law, as the large mass of cases of Fixtures which has practically and materially altered the old rigid law in England, related to matters purely commercial and industrial.

In India, however, things were entirely different. Machineries and production of manufactured goods on a large scale were not in existence here even two decades before, and although trade and commerce, in the modern sense of the term, are in their formation now, they may be said to be still in their infancy. It happens therefore, that although the English, Continental and American law of fixtures are now replete with cases and rules relating to trade and commerce, in India there is an entire dearth of it.

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1. Infra.

There is therefore no mention of the expression "trade fixtures" in any of the codes. Nor the word "trade" anywhere occurs in any section of the Transfer of Property Act, which deals with the law of Fixtures in India. To constitute a fixture in India, the thing must be attached to the earth according to any of the three modes set out in section 3 of the Transfer of Property Act. Clauses (a) and (b) relate to trees, walls and buildings, and clause (c) deals with annexation which is attached for the permanent beneficial enjoyment of that to which it is so attached. Now the question is, whether the thing attached for the purpose of trade falls under clause (c) or in other words, whether the annexation is for the permanent beneficial enjoyment of that to which it is attached. Now the things that are generally affixed for the purpose of trade are not attached for the permanent beneficial enjoyment of the principal but for the beneficial enjoyment of the thing themselves which are attached. Thus if a machinery is attached to a building for the purpose of trade, the machinery is never intended to be attached for the permanent beneficial enjoyment of the building, but is attached for the working of the machinery itself. Again, if a mill is set up in a house, it is affixed not for the good of the house but is attached in such a way that it may be worked in perfect order. Similarly the rails, the posts and wires affixed to the earth for the running of the Tram cars are affixed not for the beneficial enjoyment of the soil, but for the good running of the cars. Moreover, these things are always for temporary use, for, if the Tramway Company is abolished the use of the aforesaid things attached, also comes to an end. Similarly, if the trade, for which the said machinery or the mill is affixed, ceases to exist, the use of the machinery, as the

case may be, also comes to an end. It is clear, therefore, that the things which are attached for the purpose of Trade, exists not for the purmanent beneficial enjoyment of that to which they are attached, but for the temporary beneficial enjoyment of the particular trade for which they are so affixed. Therefore it may be said that machineries and other trade fixtures do not come within the scope of this clause. [1]

It may be contended, however, that the aforesaid Fixtures are really for the permanent beneficial enjoyment of the thing to which they are so attached, and as such, Trade Fixtures come under the purview of clause (c) of Section 3 of the T. P. Act. For example, the machinery set up in a colliery, for the purpose of raising coal and thereby carrying on the business of coal, is really for the beneficial enjoyment of the Colliery to which the machinery is attached, and the immediate purpose of raising coal by the machinery is only a means to an end, namely, the profitable working of the Colliery. Therefore clause (c) section 3 of the T. P. Act, when liberally construed, may include Fixtures for the purpose of trade. As a matter of fact the clause has been so interpreted as we find in an early Bombay decision where it is held that clause (c) would include trade fixtures and machineries permanently fixed to the land, whether for the purpose of trade or for the better enjoyment of the land itself.[2]

Similarly, in a suit for damages for the removal of oil and flour mills and steam engine and boiler,

1. Vide Dr. Gour's Law of Transfer in British India 5th Edn. P. 67.
2. Maclod vs. Kikabhai. 3 Bom. L. R. 421.

seized in execution of a decree of the Calcutta Small Cause Court, it was held in an earlier case that such things were fixtures and not goods and chattels and therefore could not be seized in execution.[1] But it appears from the latter decisions that the things or machineries attached for the purpose of trade are not annexed for the permanent beneficial enjoyment of the house to which they are attached and, as such, are not Fixtures under the Indian law. Thus in the case of Narayan Sha versus Bala Guru Swami Nadar,[2] it is held that machineries brought into a house for carrying on a business are not a fixtures. His Lordship Mr. Justice Kumar Swami Sastri observed : "The test to determine whether articles claimed as Fixtures under Section 8 of the T. P. Act, is whether they are provided for the permanent use for the house and whether they are necessary for the beneficial enjoyment of the same. "Fixture" does not include machinery brought into a home for carrying on a business."

There is thus a divergence between the earlier decisions and the latter decisions quoted above. So far as the decision reported in 4 Cal. 946 is concerned, it is significant to note that it was decided in the year 1879 when the T. P. Act was not passed. It has been already stated that section 8 of the T. P. Act is often controlled by section 108, which enables a lessee to remove the properties fixed to the demised premises during the continuance of the lease provided he does not impair thereby the former condition of the premises. It follows, therefore, that the lessee's rights of removal of the annexations made by him are generally

1. 4 Cal. 946—Miller vs. Brindaban.
2. 45 M. L. J. 385.

recognised, subject only to the proviso mentioned above. Therefore, a tenant holding the land or building under any lease is entitled to remove the things attached by him for the purpose of trade or anything else.

The question remains as to whether on a sale of the premises the property attached to the premises would pass along with the premises sold. It was held in the aforesaid case that upon the sale of a house, machinery brought into it for carrying on a business will not pass by necessary implication, how much-so-ever it might be fixed to the soil.

AGRICULTURAL FIXTURES.

The English law on the subject has been considered in a previous chapter [1] which goes to show that the relaxations in favour of the trade and ornamental Fixtures were not extended to Agricultural Fixtures, so that for a long time and even till to-day the questions involved therein are governed by the common law of England, subject, of course, to the provisions in several legislative enactments called "The Agricultural Holdings Acts." Under the common law irremovabiliy of Fixtures is laid down. The common law rule of Agricultural fixtures was further recapitulated by Lord Ellenborough in the well-known case of Elwes vs. Maw.[2] As has been already stated, the first relaxations in favour of Agricultural tenants were made by the Landlord and Tenants Act of 1851 by which a tenant erecting a building or fixing any engine or machinery exclusively for Agriculture at his own expense and with the previous consent in writing of the landlord

1. Infra.
2. 3 East 38.

is entitled to remove his fixtures, provided that, before removal he gives one month's notice in writing to the landlord, thereby giving him the option of purchasing the same. Further relaxations were made in favour of agricultural tenants by the enactments of the Agricultural Holdings Acts of 1875, 1883, 1900, 1908, 1920. These enactments enable the tenant besides the rights given to him, to claim compensation in respect of improvements made by him.

In India, the law has made no particular distinction between agricultural and non-agricultural fixtures, although the relaxations made in England in favour of the agricultural tenants by the Agricultural Holdings Acts are embodied in sections 51 and 108 of the Transfer of Property Act. With the passing of the Bengal Tenancy Act further relaxations are made to agricultural tenants of Bengal. Section 79 of the said Act enables even a non-occupancy raiyat to erect a suitable dwelling house for himself and his family with all necessary out-offices, subject to the limitation that he shall not be entitled to make any other improvement in respect of his holding without the permission of the landlord. It is also provided that in cases where a non-occupancy raiyat wants to make some fixtures by way of improvement of the holding, but cannot do so without the permission of the landlord can make such improvements himself after delivering a letter of request in writing, asking the landlord, to make the said improvements, and if the landlord fails or neglects to do the same, the tenant may make the improvement. Section 82 provides compensation for such improvements made by the tenant when he is ejected by the landlord.

With regard to the occupancy holdings a tenant is entitled on his holding to any improvement which

would add to the value of the holding. Section 76(f) of the Bengal Tenancy Act allows a raiyat to erect a suitable dwelling house for the raiyat and his family, together with all necessary outhouses. The only limitation against the erection by an occupancy raiyat is that provided under sub-section (3) of the aforesaid section which provides that the tenant by such erection shall not be allowed to diminish the value of the land.

From an analysis of these statutory provisions, it appears to be clear that under the Bengal Tenancy Act, a raiyat, be he an occupancy or non-occupancy raiyat or otherwise, is entitled to erect suitable houses on their holdings and in the case of mokarari tenants as well as in the case of occupancy tenants, where custom permits, the erection of pucca structure is allowed. These erections are certainly either removable by the tenants on the expiry of their tenancies or on eviction, and where their removal is not possible without impairing the value of the land, the tenants are entitled to demand compensation from the landlords. The test is whether the fixtures improve the condition of the holding. If so, then certainly the tenant is entitled to compensation on eviction. If, however, the fixture diminishes the value of the land, then the tenant will be deemed to have violated the provisions of sub-section (3) of section 76 of the Bengal Tenancy Act and will probably be liable for waste.

From the above, it may be remarked that so far as the agricultural fixtures are concerned, the Indian law is less rigid than the English law. And although the original common law has been a good deal broadened by the enactment of the Agricultural Holdings Acts by which the tenant's rights of removal or to

compensation are conceded to under certain exceptions, in India the tenant's rights of removal or in the alternative to compensation are so well established, that it may be said that removability of such fixtures is the rule and irremovability is only an exception allowed under special circumstances.

SUBSTITUTED FIXTURES.

Another class of Fixtures has been dealt with by the English Jurists under a separate heading and that is what they call "Substituted Fixtures". Thus where a tenant removes a fixture already on the land, erected by the landlord and substitutes his own therein, the fixture so raised, because of its method of substitution, is called "Substituted Fixture". With regard to removal of this class of Fixtures, the general law in England is that, it can be removed by the tenant unless there is a covenant to the contrary. The Indian law, should a question of this nature arise, would also be similar. Thus where a tenant engages a five-storied house and replaces the old lift of the landlord by a new one at his cost, the tenant at the expiry of his term of lease would certainly be entitled to remove his lift, provided he places the old lift again in its former condition.

In determining the question of removal of this class of fixture, the test would be to consider the object and purpose of annexation. These annexations are undoubtedly made for the convenient use of the person annexing them, and as such, are not at all fixtures, either under the English law or under the Indian law. They are in both cases regarded as personal chattels, and, as such, they do not pass with the land or building.

RIGHTS OF REMOVAL OF BUILDINGS BETWEEN THE CO-PARCENARS OF A JOINT FAMILY.

We have hitherto dealt with the question of removal of Fixtures with special reference to landlord and tenant. The question, as we have indicated in a previous chapter, arises sometimes between co-parcenars of a joint family or between co-sharers living separately. Thus if a member of a joint Hindu family builds a house on the ancestral land with separate funds of his own, questions at once arise as to whether the other members of the joint family can claim shares or compensation or in the alternative can force the co-parcener to pull down the building. Similar questions may also arise with regard to co-sharers living separately.

The earliest decision on the subject is found in the case of Khodiram Sarma V. Trilochun [1] of which reference has already been made before. In that case it was laid down that when a member of a joint Hindu family builds a brick house on the ancestral land with separate funds of his own, he and he alone would be the owner of that house and co-parceners would have no shares in it and they would only be entitled to similar land equal to their respective shares in lieu of compensation.

In another case, however, decided by the Sudder Dewani Adalat and referred to before, namely in the case of Janki Singh V. Bukhori Singh,[2] and decided on the 28th August 1856, contrary views were expressed and it was held that the co-parceners when not consenting to the construction of the house on the ancestral land, can force demolition of it.

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1. 1 Select Reports, page 46.
2. Sudder Dewani Reports, page 761.

As has been already said the law of fixtures on the point was settled in the Full Bench case of Thakur Chandra Pramanik [1] and the principles enunciated therein have been approved and followed by their Lordships of the Judicial Committee in a very recent case, where Sir Lancelot Sanderson, has recapitulated the law laid down by Sir Barnes Peacock. [2]

Therefore on the authorities cited above, it may be said that the law on the subject is well established in India and is that in the absence of a contract to the contrary, if a co-parcener builds a house on the ancestral land, the co-parceners cannot force its removal but are entitled to compensation.

These cases, as has been observed by Sir Barnes Peacock and subsequently approved of by other eminent judges, are decided in India not only on statutory provisions but also on local usage and on the principles of equity and good conscience. Therefore in the absence of a clear and specific statutory provision, the principles of equity are invoked and if they are in consonance with the local usage, equitable reliefs are often granted.

RIGHTS OF REMOVAL BETWEEN CO-SHARERS LIVING SEPARATELY.—

In the case of a co-sharer living separately building a house on the land not partitioned, the law would probably be similar and the other co sharers would be entitled to claim similar lands in lieu of compensation.

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1. 6 W. R. 228 (F. B.).
2. 46 C. L. J. 1. (P. C.) Narayandas Khettry V. Jatindranath Ray Choudhury.

CHAPTER V.

Fixtures Affecting the Rights and Liabilities of the Mortgagor and Mortgagee.

General Remarks.

In tracing the origin of Fixtures, we have remarked that Fixtures arise out of accessions by the act of parties.[1] We have also noticed there that accession comes out of (1) an act of God and (2) an act of parties. The accessions or accretions that are formed in the natural way, as for example, by alluvion and diluvion are called accessions by act of God, whereas accretions made to the land by some persons in an artificial way are called accessions by act of parties. We have already remarked that Fixture arises out of some accession or accretion made to the land by attaching something of a chattel nature to it. Now if the said land is mortgaged, questions may arise as to the right with regard to accessions or Fixtures. Thus when a land is mortgaged and there is a building attached to the land at the time of the mortgage and the mortgagee is in possession of the mortgaged property or where the building is erected after the mortgage or where the building is erected by the mortgagee in possession during the mortgage or some improvements made by the mortgagee in the land or in the building with or without the consent of the mortgagor, questions may arise as to the rights of the mortgagor and the mortgagee with regard to the accretions referred to above.

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1. See Introduction.

It has now become a settled law that when a land is mortgaged, all Fixtures pass with the land to the mortgagee. [1] Thus in the case of Haripada Sadhu Khan and others vs. Anath Nath De and others, [2] Mr. Justice Fletcher made the following observations :— "As regards the fixed machinrey, the law is well established that between the mortgagor and mortgagee, that passes by the mortgagee. The rule as between landlord and tenant does not apply between the mortgagor and mortgagee and the fixtures pass to the mortgagee. That rule has been established for many years."

It follows, therefore, that if a machinery or a plant is attached to the immovable property and the immovable property is thereafter mortgaged, the machinery or the plant will thereby enure for the benefit of the mortgagee and add to the security of the mortgaged property.

As mortgage is the transfer of an interest in specific immovable property, the ownership of the property mortgaged is transferred to the mortgagee, subject, of course, to the mortgagor's right of redemption. It is also a settled law that the accessory always follows the principal. Now, the fixture being in the nature of an accessory of the principal, namely the immovable property, the interest in the Fixture is transferred along with the transfer of the immovable property.

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1. Vide in this connection Dr. Ghosh's Law of Mortgage in India, 4th Edn. Page 179. Dr. Ghosh has enunciated the law in a very lucid way and we are tempted to quote him. "When fixtures" says Dr. Ghosh "in the nature of personal chattels are attached to immovable property, they simply follow the land, as the shadow follows the substance."

2. 22 C. W. N. 758—Per Fletcher J. at page 759.

This principle is in close conformity with the maxim in Roman law, namely, "Accessorius sequitar naturum Sui Principalis" that is to say, an accessory follows the nature of its principal, [1] as well as the maxim "Accessorium nonducit sed sequitor suum principali" which means that which is the accessory or incident does not lead but follow its principal.[2]

The principle is also in entire harmony with the English law, according to which, Fixtures, annexed to the land mortgaged, pass with the land to the mortgagee.

The German Medieval law, however, started from a different standpoint. There though houses were regarded as originally movable, in fact, they did not become part of the land. Consequently, whoever built upon another's land without any right to do so, was not only allowed but was bound to remove his house, but the ownership in the house remained with him, if the materials of the house were his own.[3]

The German Modern Law as embodied in the present Civil Code of Germany has abandoned the medieval conception and has adopted the Roman principle of accession ("Akzession") with some difference, namely, it recognises the special rights by the builder for buildings for temporary purposes erected upon the land of another.[4] It is curious to note in this connection that the Modern German Law has got some striking

1. Justinian's Institute 3, page 139.
2. Co. Litt, 152.
3. Vide Huebner's History of the Germanic Private Law, page 433.
4. Vide Huebner's History of the Germanic Private Law Page 434.

In tracing the history of the evolution of the Germanic Private Law with reference to accession of fixtures, ("Verbindung") Huebner says "The Roman Law, and likewise the

points of resemblance with the principles enunciated by Narada.

In America, however, the principle of "Quic quid plantatur solo solo cedit" has not been assiduously followed as in England, specially in the case of mortgage of fixtures There the mere fact of annexation of a chattel with the land does not confer any rights upon the mortgagee of the land in preference to the mortgagee of the chattel. Thus when a chattel is mortgaged to A and afterwards affixed to the land, mortgaged to B, then as between A and B under the American law, B, the mortgagee of the land will get no precedence over the rights of A, the mortgagee of the chattel. The principle underlying the above rule

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modern law generally, including the present Civil Code start with the principle that a chattel affixed to land becomes an essential part thereof, and consequently passes without further act into the ownership of the landowner; in particular this principle holds for buildings erected upon the land of another ("Superficies solo cedit"). The medeival law took a different position. Though houses were originally movable in fact, they did not become part of the land. Consequently, whoever built upon another's land was bound to remove his house when he had built without right to do so, but he remained the owner if he had built it of his own materials * * * * The present Civil Code has adopted the Roman principle of accession ("Akzession"), although recognising as possible objects of special rights, buildings erected upon the land of strangers, at least those erected for temporary purposes or upon the strength of a real right. The rule that he who builds upon another's land acquires ownership for himself in the land built upon (the exact opposite of the Roman principle) was unknown to the medieval law, but prevailed in the law of Wurttemberg, the Prussian "Landrecht," the Austrian Code, and several of the Swiss codes. It has been adopted in a somewhat altered form by the present Civil Code, and the Swiss Civil Code, has also retained it." (Huebner's Germanic Private Law pp. 433-34)

is that mortgage being a security, the mortgagee cannot claim more than what he got as his security at the time of the mortgage. Thus the mortgagee of the chattel would be entitled to assert his lien over the chattel, although it is affixed to the immovable property. The American law regards these questions in the light of priority of mortgages and as if there is no fixtures. But this rule is applicable only where the articles have been affixed to land already in mortgage, and it would not affect the position of a subsequent mortgagee of the land, without notice, who is certainly entitled to enforce his lien over the fixtures in preference to the claim of its mortgagee. [1]

The Indian Law here resembles entirely the English Law, so much so, that it has been held by the Judicial Committee that the English Law in this respect "is agreeable to general equity and good conscience, and as such, the English principle may properly be applied in India." [2]

This view has also received the Legislative recognition and the law has now been codified in India by the enactment of Section 70 of the T. P. Act. It lays down that "if after the date of a mortgage any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession." The Section itself is clear and the illustration given thereunder makes it all the more clear as the following will show :— "(b) A mortgages a certain plot of building land to B and afterwards erects a

1. Vide in this connection the remarks of Sir Rash Behary Ghosh—Law of Mortgage, 4th Edn, page 286.

2. Vide the cases of Raja Kissendutt Ram V. Raja Mumtaz Ali Khan, 5 Cal 198 (P. C.) and Sri Balusu Ram Lakshaman V. Collector of Godavari, 22 Mad. 464. (P. C.)

house on the plot. For the purposes of his security, B is entitled to the house as well as the plot."

Thus in a Bombay case, where a theatrical hall was built by the mortgagor after the date of the mortgage, it was held that the theatre, erected by the mortgagors on the land, after the execution of the mortgage was, in the absence of a contract to the contrary, included in the mortgage. [1]

It is to be noted here that their Lordships in deciding the aforesaid case clearly followed the English principles of Fixtures. Their Lordships thus observed : "The Transfer of Property Act makes no distinction between freehold and leasehold property for the purposes of the rule of law embodied in Section 8 and 70 of the Act. In this respect the law reproduces the English law, which is that all things which are annexed to the mortgaged property are part of the mortgage security and therefore if the deed contain no mention of structures or fixtures, they would pass to the mortgagee unless a contrary intention can be collected from the deed."

Having regard to the fact that Fixtures pass with the mortgage to the mortgagee, it seems immaterial as to whether they are specifically mentioned in the mortgage deed. In some of the mortgage deeds, however, Fixtures along with other appurtenances are specifically mentioned. It is thought, therefore, that in order to include the Fixtures among the properties mortgaged, specific statement to that effect must be made in the deed. As a matter of fact, this view was expressed by Lord Hardwick in the case of Exparte Quincey [2] and it seems probable, that the

1. 30 Bom. 250—N. C. Macleod V. Kissan Vithal Singh and another.

1. 1 Atk 477.

confusion regarding the express stipulation owes its origin to the aforesaid decision. As has been already said, the ruling laid down by Lord Hardwick was not only not followed but dissented to, in subsequent cases', [1] and it is now fully established that in all cases Fixtures pass with the mortgage to the mortgagee, even if they are not specifically mentioned in the deed.

The same view has been adopted by the Courts in India, and for a transfer of Fixtures with the mortgage, express mention in the deed is not necessary.[2]

It should be remembered, however, that the mortgage is, after all, a security for the payment of money due on mortgage. Therefore the mortgagor's right of redemption cannot be questioned. If he pays off the debt, he is certainly entitled to have his security back. So the fixtures which passed to the mortgagee along with the immovable property also come back to the mortgagor on the satisfaction of the mortgage debt. If an accession is made to the mortgaged property during the continuance or after the mortgage, question at once arises as to whether the mortgagor would be entitled to the accession on redemption.

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1. Vide Ryall V. Roll, 1 Atk, 165 ; Steward V. Lomb, 1 Brod and Bing 507.

2. Vide the dictum of Fletcher, J. in Haripada Sadhukhan V. Anathnath De and others, 27 C. W. N 758.

Vide also the remarks of Sir Rash Behary Ghosh who on the authorities of Exparte Daglish (1873) L. R. 8 Ch. 1072 ; Exparte Barclay (1874) L. R. 9 ch 576 ; Johns V. Ware, (1899) 1 ch. 359, says "But if the deed contains a special mortgage of the fixtures, so that the mortgagee can deal with them as something apart from the land, they cannot be treated as part of the mortgaged estate But in this country where there is no Bills of Sale Act, this refined distinction is not likely to give us any trouble."

—Law of Mortgage by Sir Rash Behary Ghosh, 4th Edn. Page 179.

On general principles it appears clear that he would certainly be entitled. For the fixture, passing with the mortgage, passes as a security and therefore on redemption of the security, fixture must come back, to the mortgagor. Apparently with this object in view, the legislature has enacted Section 63 of the T. P. Act. Section 63 lays down that where the mortgaged property in possession of the mortgage, receives any accession during the continuance of the mortgage, the mortgagor on redemption, shall be entitled as against the mortgagee to such accession, unless there is a contract to the contrary. But before redemption, the fixture, even if made by the mortgagor, enures for the benefit of the mortgagee and it is regarded as part of the security. If therefore, the mortgagor wants to remove the fixtures which may likely reduce the value of the security, he will be restrained to do so. [1]

It happens sometimes, that the mortgagee makes some accession to the mortgaged property by attaching something to the immovable property. What would then be the position of the mortgagor? Would he be entitled to the accession acquired at the cost of the mortgagee or would it permanently enure for the benefit of the mortgagee? The general law on the subject is, that not only the property mortgaged, but also the augmentation or increase would enure for the benefit of the creditor and therefore the mortgagee will have a right not only to the mortgage but also to its accession. [2] But it is to be remembered that the mortgagee has only a qualified right in the

1. Vide in this connection Dr. Ghosh's Law of Mortgage, 4th Edn. p. 204.

2. Story on Bailment, Art. 292.

accession and is liable to be redeemed by the mortgagor. [1] Therefore on this principle the mortgagor, on redemption, would also get back the accession acquired at the cost of the mortgagee. But it would be very hard on the mortgagee if the expenses incurred by him would go in vain. It is therefore to safeguard the interests of such mortgagee, that a provision is made in Section 63 of the T. P. Act, by which the mortgagee is allowed to remove the fixtures or in other words accession if it is capable of separate enjoyment without detriment to the mortgaged property and if the mortgagor desires to have it, he must make compensation to the mortgagee. If it is not capable of separate possession, it would of course go to the mortgagor, but he will be bound, if the accession is necessary or is made with the mortgagor's consent, to compensate the mortgagee for the outlay incurred.

It would thus appear that under section 63 of the Transfer of Property Act, the mortgagee has in some cases the rights of removal of the fixtures by him, if it is capable of separate enjoyment without detriment to the principal property. By this separation the character of the accession or fixture is changed, in as much as, it does not then remain in the position of an accessory but becomes a principal itself and therefore it can no longer be regarded as a security to the mortgage debt. Moreover, under the established law of this country, mere accident of attachment does not make it a fixture in the sense in which it is used in English law. Therefore the morgagee's rights of removal are unquestionable and if the mortgagor elects to have it, he must pay compensation to the mortgagee.

1. Vide Dr. Ghose's Law of Mortgage, 2nd Edn, p. 94.

But if it is not capable of separate enjoyment without detriment to the principal, complications may arise as to when the mortgagee is entitled to compensation. The section is clear enough and it contemplates two positions where the mortgagor would be bound to make compensation. Thus in order to make him liable, the accession must be acquired either with his consent or it must be necessary for preserving the property from destruction and thereby the accession would be advantageous to the mortgagor.

The principle underlying the aforesaid rule of law may be said to be logical and equitable. For in the case of acquisitions which are not capable of separate enjoyment, the mortgagor gets them *ex necessitate rei* with his property. He may or may not want to have them, on the contrary the accessions are somewhat thrust on him. Moreover, the acquisitions may or may not be advantageous to the mortgagor. It would therefore be inequitable if he is to pay for all sorts of accessions acquired at the cost of the mortgagee. Therefore, if such accessions are made without the consent of the mortgagor or do not add to the value of the mortgaged property, then certainly the mortgagor is not liable for compensation. The reason is clear and simple. If the mortgagee takes such risks, he must reap the consequence.

But if the accession is made with the consent of the mortgagor, he would be estopped in equity to withhold payment for the accession, although it proves detrimental to the principal. Similarly as a converse proposition, if the acquisition adds to the value of the mortgaged property, although the accession is made without the consent of the mort-

gagor, equity at once steps in and compels the mortgagor to pay for the accession.

In the case of accessions capable of separate enjoyment without detriment to the principal property, the mortgagor is not forced to take it, and so, if he elects to have it, he must pay for it.

The principle stated above is so clear that it hardly requires any case-law to expound it. The following cases are however cited as they would afford clear illustrations on the point. Thus in a Bombay case where the mortgagee re-erected the mortgaged house, destroyed accidentally by fire, it was held that the mortgagor must pay for the re-building of the house as a condition precedent to redemption. [1] In an Allahabad case where the mortgagee repaired a well, made useless from natural causes with the consent of the mortgagor, the mortgagor was made to pay for the expenses incurred. [2] Similarly it was held that a mortgagee would not be entitled to the cost of a building made without the consent of the mortgagor and in no way necessary for the preservation of the property. [3]

We have discussed the rights and liabilities of the mortgagor in respect of the accessions to the mortgaged property. We have noticed that the mortgagor's right of redemption is not confined to the mortgaged property only but it extends to its accessions also. We have also seen that when the accession is acquired at the cost of the mortgagee, but is

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1. Sakharam Vs. Amtha Devji. 14 Bom. 28.
2. Durga Singh vs. Maurang Sing, 7 All. 282.
3. Rupan Singh Vs. Champa Lall, 47 All. 81, Arunachella Vs. Sithaya, 19 Mad. 317.

not capable of separate enjoyment by him, it would go to the mortgagor on redemption, subject of course, under certain cirmustances enumerated above, to his making compensation to the mortgagee [1]

But the mortgagor's right arises at the time of redemption only, so the question remains as to whether the mortgagee would be entitled to the accession if acquired after the date of the mortgage, until redemption by the mortgagor. As has been stated before, Section 70 of the T. P. Act provides that such accession would go to the mortgagee. It may be contended that as the mortgage is only a security for the re payment of debt, any accession after the mortgage ought not in equity go to the mortgagee if the original security is sufficient. The answer to this contention may be made in the words of Sir John Colvile of the Judicial Committee in the case

1. Sir Rash Behary Ghose has explained the whole law regarding the rights and liabilities of the mortgagor and mortgagee with regard to fixtures, in a very lucid way, so much so, that I am tempted here to quote the words of that venerable and distinguished jurist. Says he "As between mortgagor and mortgagee, fixtures attached to the land by the mortgagor after the mortgage would be included in the security, and he would not be entitled to remove what are technically known as tenant's fixtures, simply because he has attorned tenant to the mortgagee ; for the attornment is merely a superadded security, and the mortgagee can not be called upon to elect between his character as landlord and his character as mortgagee. On the other hand the mortgagee must not sever the fixtures from the land without the consent of the mortgagor. Should he do so, he may render himself liable to the mortgagor for their value, as the removal would release the fixtures from the operation of the mortgage, and they cannot therefore be affected by a subsequent decree for sale or foreclosure."—The law of Mortgage in India by Sir Rash Behary Ghose, 4th edn. page 283.

of Raja Kishen Datt Ram vs. Raja Mumtazali Khan. [1] His Lordship observed "Most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security ; and that, on the otherhand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore. subject to redemption. [2]

These accessions to property pass to the mortgagee under Section 70 because they are regarded as incorporated in the original subject of security, as if they were also in existence at the time when the original security was given, "just like young trees growing upon the land, which is subject to a mortgage, and when they grow into timber, create valuable accession to the land and therefore to the security, but cannot be regarded in any sense as separate from or independent of the land, upon which they stand." [3] So long they remain with the mortgagee they are also treated as security to the mortgage and they remain with the mortgagee as security till the liabilities of the mortgagor in the mortgage are extinguished. Thus in the Calcutta case of Krishna Gopal Sadhani Vs A. B. Miller, [4] where after the execution of two simultaneous mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses and the decree in the suit by the fourth mortgagee directed that the whole of the property should be sold free of incumbrances, in

1. 5 Cal. 198 (P. C.)
2. Per Sir John colvile, 5 cal, 198, at pages 210-211.
3. Per Hill. J. in Krishna Gopal vs. Miller, 29 cal, 803, at Page 808.
4. 29 cal, 803.

separate lots, and the sale proceeds to be distributed among the various mortgagees in accordance with their priorities and the property, more or less pledged by each mortgage, and the saleproceeds were insufficient to pay off the mortgagees, it was held that for the purposes of the security of the two prior mortgagees, the two new houses were accessions to the mortgaged property and became incorporated with the original subject of the security, as though they had been in existence at the time when the original security was given. [1]

It is thus seen how the rights of the mortgagor and the mortgagee are affected by the annexations of fixtures on the mortgaged property after the mortgage. These rights and liabilities however arise as between the mortgagor and the mortgagee only, and does not affect the position of a third party and therefore these principles are not applicable if the fixtures are erected by a third party on the mortgaged property.

The question however becomes complicated where the rights of third parties are involved.

On general principles it may be said that pre-existing rights of a third party cannot be affected by a subsequent mortgage. For the mortgage being nothing but a security, the mortgagor cannot give the mortgagee anything, over which he has himself no right, and so, if he affixes certain movable things not his own to the immovable property which is mortgaged, it may be contended that the said fixtures cannot be treated as part of the mortgage. But cases have sometimes arisen, specially in the case of fixtures by Hire-purchase, where the rights of the third party, namely the owner of the hired article,

1, Per Hill and Brett JJ, 29 cal, 803.

have been defeated and the courts of law have declared in favour of the mortgagee. [1] We shall deal with this question more fully when dealing with the Hire purchase system. [2]

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1. Vide Hobson V. Gorringe (1897), 1 ch. 182 ; Reynolds v. Ashby (1904) A. C. 466 ; Vide also Dr. Ghose's Law of Mortgage in India, 4th Edn. Page 284.
2. Vide chapter VII.

CHAPTER VI.

Fixtures as Affected by Sale, Devise and Lease.

Preliminary—We have discussed in a preceding chapter as to how questions of Fixtures are affected by the mortgage of the demised land on which Fixtures are attached. In this chapter we shall deal with such transfers arising out of sale, devise and lease.

(i) Sale.

The general rule of law in England is that on a sale of land or other immovable property, things attached to it also pass with it. The application of this rule has been stretched so far as to include houses and other erections standing thereon on a conveyance of the land, although they are not specifically mentioned in the deed of sale.

This principle has been recognised even in very early times and on this principle it has been laid down that where personal chattels are annexed to the freehold, they are regarded as incidents to the freehold and on a sale of the freehold, they pass to the purchaser along with the freehold, although the deed of conveyance is in general terms. [1]

This principle has been established so completely that all the decisions from the earliest times down to the present day are based on it.

The earliest enunciation of this principle is found in the Year Book 21 Hen. [2] where it was held that vats

1. Vide Amos and Ferard on Fixtures, Ist edition, page 180.
2. 21 H. 7, 26.

fixed in a brew house or dye house would always on a sale of the freehold pass with it.

This doctrine has also been recognised by the Courts in England in several modern decisions, namely, Ryall vs. Rolle, [1]; Thresher vs. East London Waterworks Company. [2] Colegrave vs. Dias Santos. [3] In all these cases, the transfer of fixtures along with the freehold on a sale of the freehold has been unequivocally allowed. It may be noted here that Fixtures are regarded in all these cases as accessory to the principal, as such, when the principal is sold, it includes by implication the accessory also.

In the case of Colegrave vs. Dias Santos, referred to above, the plaintiff as the owner of a freehold house advertised it for sale and printed particulars were circulated, which however did not mention certain fixed articles such as shelves, closets etc. which were affixed to the house. The house being purchased by the defendants, he was given possession of it and the fixed articles still remained there. Afterwards the plaintiff wanted a separate price for the Fixtures and on the defendant's refusal to pay, instituted a suit against him. It was held that the fixtures in question passed to the defendant together with and as part of the house.

The same principle applies also in the case of things, constructively annexed to the freehold. Thus, on the sale of a house, the doors, windows, locks and keys also pass with it, although they may be distinct things. They are regarded as incidents of the principal and are constructively called fixtures, as such, they are inseparable from the house itself.

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1. 1 Atk 175.
2. 2 Bar and Cr. 609.
3. 2 Bar and Cr. 76

Thus it is clearly established in England that as a general rule, on the sale of land or a house, things annexed to it also pass with it. This rule when pushed to its logical extreme, often proves very hard on the vendors, in as much as, the purchaser is entitled under this rule to take possession of all sorts of fixtures, although they are not specifically mentioned in the deed. As a protection from this hard rule of law, it is necessary for the vendor if he wants to exclude certain fixtures from the operation of transfer to make an express reservation of them in the deed. In that case, those articles will be excluded as per contract, and if the purchaser wants to have them, he will then take them at their proper value.

The rule is, however, different in the case of purchase by an incoming tenant of fixtures, belonging to the landlord and affixed to the demised premises, as on the expiry of his term, fixtures so purchased would not go to the owner of the house along with the house. Here, the rights of removal of the purchased fixtures arise wholly out of the contract and not by the operation of the law of Fixtures. It thus differs from the case of fixtures put up by the tenant himself on the demised premises, which are governed by the general law of fixtures in England. It may be mentioned here in passing, that the Indian law is entirely different from the English law in this respect, as section 108 cl (h) of the T. P. Act enables a tenant to remove the things annexed by him in the demised land during the continuance of his lease.

In India, the general law with regard to the passing of fixtures along with the immovable property on sale, closely resembles the English law on the subject. Under section 8 of the Transfer of Property Act "unless a different intention is expressed or

necessarily implied, a transfer of property passes forthwith to the transferee all the interest, which the transferor is then capable of passing in the property, and the legal incidents thereof."

"Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth; and, where the property is machinery attached to the earth, the movable parts thereof; and where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith."

It is clear from the above, that on a sale of immovable property, its legal incidents pass with it to the purchaser. The legal incidents also are so clearly illustrated, that there remains no room for doubt as to the exact significance of the wordings used therein. Thus, in the case of land, its legal incidents mean and include, besides rents and profits accruing thereunder, *all things attached to the land.* Similarly in the case of a house, its legal incidents include among others, *locks, keys, bars, doors and windows and all other things provided for permanent use therewith.*

The list enumerated above, though not exhaustive, is sufficient to indicate generally the articles which are called Fixtures, simple or constructive. These fixtures thus pass to the purchaser on his purchasing the immovable property to which they are annexed. The law, however, makes two reservations on the general rule of transfer. The first is, that the law, embodied under section 8 will hold good unless a different intention is expressed or necessarily implied. It follows therefore that section 8 does not

restrict the rights of the parties to contract according to their interests or intention with regard to fixtures, even if these contracts be contrary to the provisions of Section 8. Secondly, these transfers will only be valid and effective, so far as the transferer has the capacity of passing in the property. So, if it is held that the fixed articles do not belong to the transferer, they will not pass to the transferee even if they are specifically mentioned in the deed of conveyance. This reservation is important, in as much as, it protects the interests of third parties, who often attach things on the land of others, either by way of improvement or for trade, ornamental, domestic and agricultural purposes. It may be noted here, that mere attachment to the soil does not make a thing a Fixture in India, and so these things retain their character of personal chattels, even if they are attached to the earth. In these cases on a sale of the land, the fixed articles referred to above, do not pass to the purchaser. This is the outstanding difference between the Indian and the English law. Under the English law, such things become fixtures and generally pass with the soil, whereas under the Indian Law, they do not necessarily become fixtures and hence the landlord is not entitled to them. For a determination as to whether fixed articles would pass with the land or immovable property when sold, courts in India will have therefore to find whether the vendor has or has not a subsisting right, title and interest over those articles. If it is found in favour of the vendor, then the Fixtures would also pass with the land, even if they are not specifically mentioned in the deed of sale, but if they are found against the vendor they would not pass even if they are specifically mentioned in the deed. Thus, when a tenant takes the lease of a house for a

certain period, and, during the continuance of the lease, attaches certain machinery in the house for some permanent use, and if the house is sold to another person together with the machinery standing thereon, it is clear under the above proviso of section 8, that the machinery would not pass to the purchaser, as the landlord does not acquire any right to it, whereas on the contrary, under Section 108 of the T. P. Act, the tenant retains a right over it, and is therefore entitled to remove it before the expiry of his term.

It has been stated above, that in India mere attachment to the earth does not make a thing a fixture. It has also been shown in previous chapters that rights of removal by the parties annexing articles to the immovable property, are, subject to certain reservations, generally recognised. In these cases, it may be said that the position of the parties so annexing articles is not affected by the sale of the land or other immovable property, as the case may be. Subject to these reservations, fixed articles, when they are held to be fixtures, pass with the land or other immovable property on its sale.

The principle is so clear and settled that it does not require the citation of any authority to elucidate it. One case may, however, be cited here as it would illustrate the principles discussed above. Thus, in a Bombay case, where the plaintiff sued for possession of certain mango trees standing on certain land which had been sold to him by the defendant No. 2. The defendant no 1 pleaded, that he had been in possession as mortgagee of defendant no 2. The lower Court held that the trees had been mortgaged to the defendant No. 1, and subject to the mortgage, the

trees had been sold by defendant No. 2 to the plaintiff. It therefore passed a decree directing possession of the trees to be given to the plaintiff on his paying the defendant No. 1, the amount of the mortgage debt. On appeal, the District Judge reversed the decree of the 1st Court. The High Court, however, on second appeal, reversed the lower appellate Court's decree and held that the trees being attached to the earth were included in the legal incidents of the land, and would pass to the transferee under a deed of sale of the land on which they stood, unless a different intention was expressed or implied. [1]

(ii) DEVISE.

The general rule of law prevailing in England with regard to the devisee's rights of Fixtures is deduced from the legal maxim "Quod ædificatur in area legata cedit legato." According to it, the devisee of the land or a house gets with it, all articles that are affixed to it, whether the annexation takes place prior or subsequent to the date of the devise, provided the testator has a devisable interest in it, for it is a general rule of law that the testator is only entitled to dispose of property by will which is, in general, devisable. Thus a tenant for life or in tail is not at liberty to dispose of by will, the doors, windows or wainscot of a house of a house nor even personal chattels that are affixed to the house and forming part of it, and if he does so, it would be void.[2]

Subject to the aforesaid reservations, the testator's right of devise is unlimited. And by a devise of a immovable property, all personal chattels annexed

1. Vide the case of Pandurang Sheshagir V. Bhimram Kesav Hiralikar, 22 Bom. 610.
2. Vide Amos and Ferard on Fixtures, 1st Edn. p. 190.

thereto, and which are essential for its enjoyment would pass to the devisee. This principle has been recognised in several cases and is regarded in England as settled law. [1] It has also become a recognised rule that things, constructively annexed to the house, such as locks, keys and rings of a house, will pass with the house on a devise to the devisee. [2] The law has been pushed so far, as to include all accessories to the principal, even if they are distinct from it. Thus, when the owner of a mill took out one of the mill-stones to pick or gravel it and then devised the mill while the stone was severed from it, it was held that it would pass to the devisee as a part of the mill.[3]

It may be noted here, that the devisee will get only those fixtures that are annexed to the realty and are considered as part of the inheritance and will thus not be entitled to those which are held to be personal assets in the hands of the executor. The principle underlying this rule is the general rule of law with regard to the passing of properties as between the heir and the executor. The point, however, is not free from difficulty, and it is sometimes doubted as to whether the devisee's claim to Fixtures, held to be executor's assets, will in all cases be disallowed. Thus, for example, in the case of emblements, although in general they belong to the personal representative of the owner, yet if there is an express devise of the land itself, the devisee then would take not only the land but the growing crops standing thereon as appurtenances to the land devised. This principle has been recognised in

1. Vide Shep. Touch. 469, 470 ; Colgrave V. Dias Santos, 2 Bar and Cr. 80 ; Herlakenden's case, reported in 4 co, 64.
2. Vide Liford's case, 11 Co. 50.
3. 6 Mod 187.

more than one cases, where it is held that in these cases, it is to be presumed that the intention of the testator is to devise not only the land but all its appurtenances. [1]

Now if the devisee of land is entitled to emblements, it may be said, that he is also entitled to fixtures which are very analogous to emblements, although the heir cannot take them with the estate.

In cases of the Will, however, the intention of the testator is the sole factor for determination of the questions arising thereto. Thus, the question whether a particular fixture would or would not pass with the devised property, will be determined by the intention of the testator, as gathered from a liberal construction of the will. Consequently, if the intention of the testator happens to the subversive to the general principles discussed above, the intention of the testator is to prevail, till and until, the provisions of the will do not offend against the public policy and morality or otherwise become unconscionable under law.

INDIAN LAW.

In India, questions relating to will and all questions of transfers arising thereto, are governed in the case of the Hindus under the Hindu Wills Act and in the case of Mahamedans under the provisions of the Mahamedan Law and in all other cases under the Indian Succession Act.

The general principles of law embodied therein are so similar to those prevailing in England, that it may be said that the principles of transfer of Fixtures in India apply *mutatis mutandis* to those in England. Thus in general, with the devise of a house all its

1. Vide 1 Roll 89, 727 ; Cox vs. Godslave, 6 East 604 (*n*).

easements and incidents pass to the devise, unless they are excluded by the express provisions in the Will.

The law as between the heir and the executor as is in vogue in England has no application in India, for there is no such distinction recognised under the Statute books of India and consequently a good deal of discussion which has embarrassed the Courts in England is absent here.

But the principles involved therein are generally recognised here in India in respect of the difference arising out of transfers by persons having an absolute interest and limited interest. The testator having a limited interest will not be able to devise property absolutely. Similarly the devise of a property will not take to the devisee the protected interests of persons, having limited interests therein.

Having regard to the fact that the intention of the testator is the principal test of deciding all questions relating to Wills, it is safer to mention the articles specifically in the Will, which are or are not intended to be devised, for in that case, there will be no room for doubt or ambiguity. Following this, it is growing to be a practice here to mention the fixtures in the Will. This practice should be encouraged as it would put a stop to all litigations which are commonly dragged to the Courts, because of the ambiguities in the provisions of the Will.

(iii) LEASE.

The question of Fixtures affecting the rights and liabilities of the lessor and lessee is an important question in the whole law and requires some consideration here. The common law of England, it may be said, has made no distinction between lease and other modes of alienation and the principle of "Quic quid plantatur solo solo cedit" equally applies

in the case of transfer of Fixtures by lease. The relaxations which were made from time to time, as has been already noticed, were not in favour of any particular mode of alienation but in respect of certain class of Fixtures, which are commonly known as "trade and domestic fixtures." Enactments, making certain relaxations, were made subsequently in favour of another class of Fixtures which is known as "agricultural fixtures," and nowhere any special allowance has been made in the case of lease as distinguished from mortgage, sale and devise. Under the English law, the lessee does not acquire any special rights of removal of his fixtures made in the demised land, unless it comes within the category of either trade and domestic fixtures or unless he gets a right of removal under the Agricultural Holdings Act.

The Indian law, however, differs entirely from the English law. Here a special provision is made in section 108, clause (h) of the Transfer of Property Act, wherein it is provided that a "lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it." It is clear therefore, that the aforesaid clause enables the tenant to remove all his fixtures, subject only to the proviso that he leaves the property unaffected; and does away with the distinction prevailing in English law between what are and what are not tenant's fixtures. Nowhere has the Indian law differed more clearly and unequivocally from the English law, than in the case of lease and the lessee's rights of removal of Fixtures arising thereto, and it may fairly be said that clause (h) of section 108 of the Transfer of Property Act is an authoritative exception to the maxim "Quic quid plantatur solo solo cedit."

The aforesaid provision in the Transfer of Property Act is so clear and exhaustive that it hardly requires any case-law to support it. Yet there are many cases on the point and the point has been lucidly and elaborately dealt with by Sir Ashutosh Mukherjea in the case of Mofiz Sheikh v. Rasiklal, [1] and by Sir Bhashyam Ayyangar in the case of Ismai Kani Rowthan V. Nazarali Saheb and another. [2] These cases have been discussed in the previous chpaters, where the whole question of fixtures, as affected by lease has also been dealt with. It would be mere repetition to discuss those questions over and again here, and suffice it would be to say, that under the Indian law, the lessee is entitled to make any sort of fixtures, be it, for the purpose of his trade or agricultural or for domestic or ornamental use and he is further entitled to remove his fixtures before the expiry of the lease, provided such removal of Fixtures does not impair the original condition of the immovable property to which it is so attached.

If the removal impairs the original condition of the immovable property, then of course under the aforesaid provisions, the lessee is not entitled to remove his fixtures, but he may be allowed compensation under Section 51 of the Transfer of Property Act for the improvements thus made by him.

The time for removal has also been fixed by the statutory provision in clause (h) of section 108. The right of removal must be exercised during the continuance of the lease and the lessee cannot claim re-entry for the purpose after the expiry of the lease.[3]

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1. 14 C. W. N. 952.
2. 27 Mad. 211.
3. Re Ram Baran, 2 All. 896.

The aforesaid section only gives the lessee his rights of removal of Fixtures and makes no provision for compensation in any case. The lessee therefore cannot have any alternative right to compensation in case of non-removal, [1] in the absence of course of circumstances giving rise to an estoppel against the landlord. [2]

The rights of removal given to the lessee under the provisions of clause (h) of section 108 of the Transfer of Property Act can however only be exercised in the absence of a contract or local usage to the contrary and if by a specific stipulation, the lessee foregoes his rights of removal, he cannot then take shelter of the aforesaid clause and cannot claim re-entry for the removal of his fixtures.

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1. Sheikh Hussain, 20 Bom. 1. Re Jagmohan Das, 22 Bom. 1; Naunihal, 19 All, 328; Ismai v. Nazarali 27 Mad. 211.
2. Beniram V. Kundanlal, 21 All. 196.

CHAPTER VII.

The Law Of Fixtures Affecting The Hire-Purchase System.

General observations.--Of late there has been a marked growth in India of a certain mode of transfer of a class of movable property, specially in the nature of machines and machineries, gramophones, pianoes, motor-cars etc., under what is commonly known as sale by hire-purchase agreements. By this agreement, the owner lets to the hirer certain movable articles and delivers the same to the hirer upon certain terms and conditions generally with regard to their price stipulated in the agreement and if the terms and conditions are duly fulfilled by the hirer, the absolute property in the articles would vest in him; but till the conditions are fulfilled, the ownership would remain with the owner and in default they would be restored to the owner and the hirer would lose all rights of possession over them.

It is clear therefore that it is neither a complete sale nor a simple hire, nor even a pledge or bailment.

The difference between it and a sale is, that by a sale, pure and simple, the ownership in the property sold, at once vests in the purchaser, but under the hire-purchase system, the ownership remains with the vendor with the chance of its being conveyed to the purchaser on the happening of a certain contingency, which may or may not come in.

Similarly it cannot be called a simple hire, inasmuch as there the goods are let to the hirer for a temporary purpose and there is no condition, express and implied that the goods would eventually become the hirer's property.

It is not even a pledge or bailment. For, in the case of a pledge, the goods are pledged to the lender by the borrower to secure for him a loan, on the condition, express or implied, that in default of the repayment of the loan, the goods pledged could be put to sale for the recovery of the loan. In other words the goods pledged are regarded as security for the loan, but under the hire-purchase system, the hirer or the borrower does not give any security for the article delivered to him, excepting a promise to pay up its price and to act up in other respects in accordance with the agreement.

Yet it has its similarity with all the three. The transfer under the hire-purchase agreement, although does not effect an immediate sale, really contemplates a sale to be perfected at a remote date on certain conditions being fulfilled. At the time when such agreement is entered into, the intention of the hirer is to purchase and the owner to sell it, and on that understanding, the first instalment of the purchase money is paid and the article is delivered to the hirer. It is therefore more than a mere contract for sale and may even loosely be called a remote or contingent sale.

It has also its traits of similarity with the pledge or bailment. Because, by the hire-purchase agreement it clearly follows that when the full price, to be paid in instalments are paid to the owner, the goods become the absolute property of the hirer, but till that is done, the ownership remains with the lender or vendor as if by way of security for the due payment of future instalments or as if the lender places the property by way of security for the instalments already paid till the contingency transferring the ownership arises, and in all the aforesaid cases the hirer becomes only a bailee thereof.

In view of its traits of similarity with sale, pledge and hire, confusions often arise with regard to its exact nature. Sometimes, it is thought that it is an out and out sale, only the payment of the whole purchase money being deferred for a certain time according to the agreement. On the contrary, it is often thought that it is either a hire which by certain over acts is converted into a sale or it is only a pledge and till the conditions are fulfilled and purchase money paid, the hirer is no better than a bailee.

As has been said above, it is neither a sale nor a hire nor a pledge, although it has its affinity to all the three. It may be said, however, that it stands by itself and is difficult to put it into any of the above common modes of transfer.

Be that what it might be, one thing is, however clear, and is that it adds to the complications to the already complicated law of Fixtures, when machineries let out on hire-purchase system are affixed and thereby become fixtures by the operation of law. These machineries are in most cases attached permanently to a house or a building or to the soil, so much so, that they lose their character as chattels and become merged with the immovable property to which they are attached. These annexations are of course made mostly for the purpose of carrying on trade or business and if by such annexations they become fixtures they may be classed in the category of Trade Fixtures.

Questions at once arise as to the rights of removal of those machineries let out on hire-purchase system. If for instance, the hirer mortgages his house in which these machineries are fixed up and then fails to pay up the hire of the machineries according to the hire-purchase agreement, complica-

tions arise as to the relative rights of the owner of the machineries and the mortgagee. Or, when the hirer is the lessee of a house and brings in certain machineries on hire-purchase system, and these are affixed to the house, and subsequently the lessee fails to pay up both the rent of the house as well as the price of the machinery, questions then may arise as to whether the lender or vendor of the machinery would be entitled to remove the machinery from the house as against its owner. The law of fixtures therefore is of great importance in relation to the hire-purchase system, in as much as, the final adjudication as to the ownership of the machineries is very much affected by a determination as to the rights to the fixtures.

The hire-purchase system is purely of foreign growth and was not in much use in India till recently. There is therefore no statutory provision with regard to the hire-purchase system in any of the codes of India. The origin of the hire-purchase cannot be traced to any indegenous system and is directly traceable to the system prevailing in England, so much so that it may be said, that so far as the hirepurchase is concerned, the English system is simply engrafted in India. Thus, the agreements that are entered into between the parties for this kind of purchase, are often drafted in accordance with the English procedure and the forms used therein are mostly English.

It is therefore necessary, before attempting to discuss the law in India, to examine closely the law relating to the hire-purchase as prevailing in England.

The English law of fixtures as has been stated before, is set forth in the maxim "Quic quid plantatur solo solo cedit." But having regard to great relaxations made in favour of tenants, first in respect of

fixtures for trade and then for domestic and ornamental use, and having regard to the enactments of several statutory provisions in favour of agricultural tenants under the Landlord and Tenants Act of 1851 and The Agricultural Holdings Acts, the old common law of fixtures has been so modified now-a-days, that it practically consists of exceptions of the above rule, so that it may sometimes be said loosely, that it has become an established law that all fixtures may be removed by the tenant, subject, of course, to certain conditions, unless there is a contract to the contrary.

It really happens that, subject to certain conditions, the tenants right of removal of fixtures is generally recognised. The law has gone so far as to allow the tenant-purchaser or the mortgagee to remove fixtures within a reasonable time, even in cases where the tenant surrenders his lease. [1]

Having thus stated the general law of fixtures in England, let us see how far this law is applicable to the hire-purchase system. To begin with, let us consider how the relative positions of the landlord of hirer's premises and the owner of the hired chattels are affected by the law of Fixtures It may be contended at the outset that the position of the owner of chattels let on hire to a tenant is similar to that of the tenant's purchaser, or mortgagee or debenture-holder and as such, on the determination of the tenancy, the owner of the Chattels would be at liberty to remove them within a reasonable time afterwards, if the conditions in the hire-purchase agreement are not fulfilled by the hirer.

As a matter of fact the question came up for decision in the case of British Economical Lamp

1. In re Glasdir Copper Mines, 1 ch 819 ; Pugh v. Arton, 8 Eq 626.

Company v. Empire Mile End.[1] In that case the plaintiffs let electric light filament lamps on hire to the lessees of a theatre. The lamps were affixed to their brackets by the bayonet attachment in common use for the purpose. The defendants, who were the owners of the theatre, re-entered for non-payment of rent, when the lamps were on the premises. Thereafter, the plaintiffs sued the defendants for the recovery of the lamps, of which they were the owners. It was held, however, that the plaintiffs were not entitled to recover the lamps from the owner of the house. The decision rests probably on the general principle, that which is fixed to the soil, on transfer, passes with the soil. The lamps therefore being affixed to the house would pass with the house, and so when the owner of the house gets back the house, the fixtures attached thereto would enure for the benefit of the landlord. The plaintiffs, being the owners of the fixtures, may have their rights against the hirer, but as between themselves and the owner of the house the general law of irremovability of fixtures would apply.

The decision, it would thus appear, was contrary to the principles enunciated in the case of In Re Glasdir Copper Mines cited above, according to which the plaintiffs being the owners would have been entitled to remove them.

In the opinion of Mr. Russell, the eminent English lawyer and whose book on the Hire-purchase system may be regarded as an authority on the subject, the decision in the *British Economical Lamp Company* cited above, is not correct, in as much as, if the lamps were fixtures, the plaintiffs ought to have been allowed to remove them on the authority of In Re *Glasdir*

1. 29 T. L. R. 386.

Copper Mines,[1] whereas, if they were not fixtures but mere chattels, the plaintiffs, as the owners of the chattels, must have a right to remove them on the determination of the tenancy.[2]

On closer examination, however, of the views expressed by Mr. Russel, it seems that Mr. Russell's real objection ought to have been whether the maxim "Quic quid plantatur solo solo cedit" can be extended even to cases where the movables of one are fixed by another, on the land of a third person. It will really be unreasonable to hold that even a thief or a trespasser can deprive the owner of movables of his property by fixing them on the land of a third person, upon which the thief was merely a trespasser. The real meaning of the maxim "Quic quid plantatur solo solo cedit" seems to limit it to those cases only, where the fixing of the movables may either directly or constructively be imputed to the owner of those movables. The true test in cases like these would be whether the facts are such as would entitle a court of law to say that the owner of the movables knew, what would be the destiny of the property, and either directly authorised the act or acquiesced in it.

It may be said, however, in support of the decision in the British Economical Lamp Company cited above, that it rests on the accepted principle of law relating to fixtures. No doubt there are many exceptions to the rule and the decision of Justice Joyce, in Re Glasdir Copper Mines is one of those, but as the irremovability is the accepted rule of fixtures till to-day, it cannot be said that the dictum of Justice Joyce referred to above,

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1. 1 Ch 1819.
2. Vide Russell on Hire-purchase System, 5th Edn., page 132.

is an authority for the proposition that all fixtures of the above description are always removable by the plaintiffs.

The decision, however, loses sight of one significant fact, namely, the object and purpose of the annexation. The lamps were either affixed for the better conduct of the theatre or at any rate for decoration. In any view of the matter it falls in the category of Fixtures either for trade or ornamental use, and as such removable by the tenant. If therefore it is removable by the tenant, it is also removable by the owner of the hired chattels. In this view of the matter the decision seems contrary to the principles regulating trade or ornamental fixtures.

Where the tenant has the right to remove fixtures, the right can be enforced against the landlord's mortgagee, provided that the right is exercised during the continuance of the tenancy. This principle was enunciated in an early case decided in 1885 and was subsequently followed in several other cases.[1] It may be noted here that this principle was approved in the well-known case of Gough v. Wood,[2] and is still regarded as a leading case on the subject of hire-purchase. There, the hirer of some apparatus under the hire-purchase system and affixed to his land, executed a legal mortgage of his land to a person who had no notice of the hire-purchase agreement. On the hirer's failure to pay the purchase money, the owner of the apparatus removed it. In an action between the mortgagee and the owner of the hire, it was held that the owner was entitled to remove it as against the landlord's mortgagee.[3]

1. Vide the cases of Sanders v. Davis, 15 Q. B. D. 218; Thomas v. Jennings, 66 L. J. Q. B. 5.
2. 1 Q. B. 713.
3. Gough v. Wood, 1 Q. B. 713.

No difficulty, however, arises, where there is an express condition with regard to the removal of fixtures let on hire. For then the decision would be based on the express covenant. It is safer therefore, for the protection of the rights of the owner of the articles let on hire, to insert a clause clearly defining the rights of the parties to remove those fixtures and it would be all the more better, if the landlord is made a party to the agreement. [1] This safeguard is deemed necessary, because, in view of the uncertain state of law regarding the hire-purchase system even in England, the hirer often wants to defraud the owners of the hire by recklessly mortgaging, selling or otherwise disposing of the house in which the articles on hire are affixed, without any mention of the hire-purchase agreement, and thereby the owners often run the risk of losing their articles by the operation of the law of Fixtures.

On an analysis of the above, the law with regard to fixtures let on hire-purchase system as between the owner of the hire and the landlord may be formulated as follows :—

I. In the absence of any express stipulation to the contrary, the common law of fixtures as set forth in the maxim "Quic quid plantatur solo solo cedit" is applicable also to articles let out and affixed on hire-purchase system, and as such, on transfer of the immovable property, they follow it to which they are annexed. The owner thereby loses all rights to his articles, and being fixtures they enure for the benefit of the landlord.

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1. Vide in this connection Russell on Hire-purchase System, 5th Edn. page 133.

II. But if there is an express covenant for the purpose, the parties would be governed by the terms of the covenant.

III. On general principles, the removal of the articles let on hire and affixed to the immovable property, to wit, a house, should be allowed, if the articles are hired for the purpose of trade or domestic convenience.

IV. Where the tenant has rights to remove his fixtures, the said rights will not be affected by the subsequent mortgage of the land. And if those fixtures are let on hire-purchase, the rights of removal of the owner of the hire would be the same as that of the tenant.

As has been already stated, although there are good many exceptions, the common law rule of fixtures is still adhered to as good law. Therefore it goes without saying that fixtures pass along with the immovable property to the transferee on its sale or mortgage or assignment. The same rule applies generally to the fixtures arising out of the hire-purchase. It follows therefore, that the owner of the chattels, let on hire, often runs the risk of losing his chattels on such transfer by the hirer.

The rule, when strictly followed, proves often very hard and inequitable to the owners of chattels let on hire, who, through no fault of theirs, have to suffer the consequence of a bad bargain.

It appears, however, that in England efforts are being made to put a stop to this inequity. Where law is stringent, equity steps in, and the Courts in deciding the question, as to whether the owner of the hired chattels and affixed to the mortgaged premises, will be entitled to remove his chattels as against the mortgagee of the premises, often views the matter from

an equitable standpoint, namely, whether the mortgage is legal or equitable, whether the mortgagee had notice of the hire-purchase at the time of the mortgage, whether the mortgagee is in possession of the mortgage and whether there is an express or implied consent of the mortgagee to the removal of the chattels.

If it is an equitable mortgage or if the mortgagee had notice of the hire-purchase at the time of the mortgage or if some sort of assent, express or implied, can be imputed to the mortgagee, the Courts would certainly estop the mortgagee from questioning the owner's rights of removal.

Nor is the process of law slow to remedy this injustice. Stringent conditions, express and unequivocal terms are often inserted in the covenants, by which the rights of the owners with regard to removal are safeguarded against all sorts of possible contingencies.

It may be remarked here, that the law of the hire-purchase, even in England, is only in its making and has not yet attained its maturity. The laws therefore are meagre and the rulings are often conflicting. It happens therefore, that in the absence of any statutory provision, as well as, in the absence of any direct authority on the point, the Courts in England have to decide the cases on the principles of justice, equity and good conscience. But since the standard of equity and good conscience differs according to the mentality of the judges, as well as according to the particular circumstances of each case, the rulings are bound to be different and conflicting, although not many cases have hitherto been decided on the subject. Indeed the history of the law of hire-purchase system

is the history of this uncertainty and difference, as an analysis of the following cases will show.

The earliest decision on the subject is found in the case of Cumberland Company vs Maryport.[1] The question there arose as to whether the owner of the hired chattels had the rights of removal of the chattel as against the mortgagee of the hirer. It was held that he could do so in the absence of a contract to the contrary. In that case. the Cumberland Company was a limited Company and lessees of a colliery for a term of 50 years. The Company demised the colliery to their bankers by executing a legal mortgage together with all fixed machinery and machines then standing or thereafter to stand on the mortgaged premises.

Subsequently, the Company entered into an agreement with certain vendors for the erection by them at the Colliery of a machine, on condition that the purchase money from the machine was to be paid by monthly instalments, and as soon as the whole purchase money was paid, the machine would become the property of the Company but till the money was fully paid, it would remain the property of the vendors. The machine was thus erected and work was commenced. The Company after paying several instalments failed to pay the balance. The company having also failed to satisfy the mortgage debt, the bankers brought an action to enforce their security, and on their motion, a Receiver was appointed who took possession of the Colliery and the machine erected by the vendors. Thereupon the vendors wanted to remove the machine and they were allowed to do so.

It appears, on an analysis of the above case, that the rights of the owner of the hired articles to remove

1. 1 Ch. 415.

his chattels on a breach of covenant was conceded to, even as against the legal mortgagee. It is to be noted here, that in the above case, the hire-purchase agreement was entered into after the mortgage, and it does not appear whether the mortgagee had notice of it. Even those considerations did not affect the rights of the owner over his chattels.

This principle was also approved in the subsequent case of Gough vs. Wood. [1] In that case, one Edmonds was the lessee of a certain land of which the lessor was one Moon. Edmonds being a nurseryman, brought in some hot water apparatus from the defendants on hire-purchase system. In the agreement, the lessor, the aforesaid Moon was also made a party, and it was stipulated that the price was to be paid in instalments and till the money is paid the ownership of the apparatus would remain with the defendants, and in default of payment, the defendants would be at liberty to remove the materials. It was expressly stated in the agreement that the lessor was made a party with the avowed object of giving the defendants power to enter and remove the apparatus. After that, the said Edmonds executed a legal mortgage of his land to the plaintiff who had no notice of the hire-purchase agreement. On Edmond's failure to pay the purchase money, the defendants entered and removed the apparatus while the mortgagor was in possession. The mortgagee then brought an action against the defendants for wrongfully removing part of the property mortgaged to him. It was held, that the defendants could remove the machinery, and under the circumstances of the case, the mortgagee's implied assent to removal may be imputed.

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1. 1 Q. B. 713.

The above case was, for a considerable time, regarded as an authority for the proposition, that if the mortgagee of business premises allows the mortgagor to be in possession of the mortgage, that fact would be construed as an implied authority to the mortgagor to carry on his business. Therefore the mortgagee would be bound by any contract entered into between the mortgagor and a third person for lawfully carrying out the business and as such, cannot restrain the owner of the hired articles to remove them in accordance with the agreement. The principles enunciated therein were, however, dissented from, in two subsequent cases, namely, in Huddersfield Banking Company Limited vs. Lister, [1] and in Ellis vs. Glover. [2] There, it is laiddown that a mortgagor is not entitled to remove fixtures excepting with the consent of the mortgagee, express or implied, and that, as a general rule, no authority ought to be implied from a mortgagee to a mortgagor in possession to remove trade fixtures, affixed to the mortgaged premises. In Ellis v. Glover, however, it is significant to note, that although Lord Justice Farwell differed from the decision in Gough v. Wood [3] so far as the implied authority is concerned, the mortgagor's rights to remove fixtures, affixed to the mortgaged premises in possession, is recognised, subject only to the proviso, that the mortgagee can restrain him by an injunction, if by such removal his security is proved insufficient.

In that case, it was expressly stipulated, that the mortgagor would not be at liberty to remove the fixtures without the consent in writing of the mortgagee. The facts are briefly these. The mortgagor

1. 2 Ch. 273.
2. 1 K. B. 388.
3. 1 Q. B. 713.

executed a legal mortgage of his freehold premises and all fixtures, then and thereafter, to be affixed to the premises, and in the covenant, it was stipulated that the mortgagor would be debarred from retaining those fixtures without the consent in writing of the mortgagee. The mortgagor, however, remained in in possession and affixed certain trade fixtures obtained under a hire-purchase agreement. In the agreement the owner of the hired articles had the usual rights of removal in default of payment. There was default and the owner accordingly removed the articles. The mortgagee then brought an action against recovery on the ground that his security was depreciated, and it was held, that in the fact of an express covenant, no authority by the mortgagee could be implied.

It seems clear, however, that their Lordships in deciding the case were confronted by the express covenant and therefore the case was decided under the peculiar circumstances of the case It can therefore be said that this case did not overrule the principles of law laid down in Gough vs. Wood, [1] which may still be regarded as good law.

But in another case, almost under similar circumstances, the common law rule of Fixtures was strictly adhered to and the owner's rights of removal to the hired machinery was refused That was the well-known case of Hobson vs Gorringe.[2] In that case, a gas engine was let out under hire purchase agreement, with the usual conditions as to payment and passing of ownership The hirer was the owner in fee of a saw-mill and erected the engine on his premises so that it was converted into Fixtures by the operation

1. 1 Q. B. 713.
2 1 Ch. 182.

of law. The hirer shortly afterwards executed a legal mortgage of the free-hold property in which the mortgagee had no notice of the hire-purchase agreement. Afterwards the hirer became bankrupt and the mortgagee, thereupon, took possession of the mortgaged premises, together with the gas engine affixed there On the hirer's failure to pay the purchase money of the engine, its owner sued the mortgagee for the recovery of the engine. It was held that he could not do so. It was observed by their Lordships in delivering judgment that the engine, being affixed to the free-hold, became part of the free hold and as such, it passed with the free-hold on transfer. It is significant that the case did not take any notice of the equitable claim of the owner of the engine.

This principle was approved and followed in the case of Reynolds vs. Ashby, [1] and the owner's right of removal of the hired article was refused.

In the case of In re Allen, [2] the owner's right as against the mortgagee was, however, recognised. In that case, certain machinery was obtained by a Company under a hire-purchase agreement, and was attached to its premises for carrying on business.

Subsequently an equitable mortgage was executed by the Company in favour of a certain Bank, without giving any notice of the hire-purchase agreement. The Company, thereafter, failed to pay off the purchase money of the machinery. Thereupon the owner of the machinery gave notice demanding the return of the machinery. It was held that the owner's right must be deemed to be greater than the mortgagee's, in as much as the Bank being an equitable mortgagee, took, subject to the hire-purchase agreement,

1. (1904) A. C. 466.
2. 1 Ch. 575.

that such agreement created an equitable interest by which a subsequent purchaser, who had not the legal estate, was bound, and that the interest of the Bank under its equitable mortgage was postponed to the interest of the owners of the machinery under the hire-purchase agreement.

From an analysis of the cases cited above, it would unmistakably show, that as between the owner of the hired article and the mortgagee of the hirer, the decisions are not unanimous and the principles laid down are often contradictory. In some cases the inflexible rule of Fixtures was rigidly followed, while in other cases the equitable right of the owner was held above the law. The result is that no established principle on the subject can be found, nor any settled law on the point can be enunciated.

It is difficult therefore to formulate the laws in rigid form. The following principles, however, may be deduced from the cases cited above.

(1) As between the owner of the hired article and the mortgagee of the immovable property to which the articles are fixed, the mortgagee's right would prevail, if it is a legal mortgage and executed prior to the hire-purchase agreement and without notice of it.

(2) That the owner's right would prevail, if the right of removal was exercised, while the mortgagor was in possession with the consent, express or implied, of the mortgagee.

(3) That no authority ought to be implied from a mortgagee to a mortgagor in possession to remove trade fixtures affixed to the mortgaged premises.

(4) That when there is an express covenant by the mortgagor against removal, the owner as against the mortgagee must be bound by its terms.

(5) That in the case of equitable mortgage, subsequent to the hire-purchase agreement, the owner's rights of removal should prevail.

We have hitherto given an outline of the law of hire-purchase, as prevailing in England. We have seen that even there, the law is still in its making. In India, there is practically no specific law on the subject. As a matter of fact, complications have not hitherto arisen, so as to call for a codification at the hands of the Legislature. But the vast progress and the rapid growth which now-a-days is evinced in the sale by hire purchase system in India, lead us to think that there will come a time, sooner or later, when there will be a general demand for a codified law on the subject.

Till now, there is no reported case on the subject and therefore, should a case on the hire-purchase come up before the Court in India, it will have to be decided as one of first impression. It is difficult to forecast at this stage, as to what would be the guiding factor when deciding here a case on hire-purchase system. Probably, the Courts in India will have to look into the English cases on the subject. But having regard to the fact that the English law of Fixtures has only a limited application in India, and having regard to the different circumstances of the country, the courts in India would probably be reluctant to adopt the English law on the subject in its entirety. The guiding factor in those cases, would thus, in all probability, be the principles of justice, equity and good conscience.

But if there is no specific statutory provision on the subject, let us see if it can be discussed according to the provisions of the general law of fixtures in India.

In India, however, the law of fixtures is not so stringent as the common law of fixtures in England. It has now become a settled law in India, that mere accident of attachment does not make a thing a fixture.[1] It has also become a settled practice, when deciding questions of fixtures, that the courts in India, in the absence of any specific statutory provision, are guided by the principles of Hindu and Mahomedan law as well as by the principles of equity and good conscience.[2] Now, under the Hindu and Mahomedan laws, the rights of removal of Fixtures, subject to certain conditions, are generally recognised. Applying those principles to the hire-purchase agreements, it may be said that the owner of the hired article has a general right of removal of his article attached to the house or soil of the hirer, provided such removal does not impair the condition of the immovable property to which it is so attached. It has already been stated that a transfer by hire-purchase agreement is neither a sale nor a lease, nor even a pledge. It may therefore be contended, that in India, the provisions relating to Fixtures, in the case of sale or mortgage or lease, will have no application in the case of hire-purchase agreement.

On closer examination, however, it would appear that the contention is fallacious. For, the question of fixtures is determined in the different aspects referred to above, not according to the particular denomination of the fixtures, but according to the circumstances in which it is affixed, and according to

1. Vide the case of Thakur Chandra Pramanik, 6. W. R. 228 (F. B.), which has been approved in the recent Privy Council Case of Narayandas Khety V. Jatindranath Roy Choudhuri, 46 C. L. J. 1, (P. C.)

2. 27 Mad. 211 ; 14, C. W. N. 952.

the rights of the parties exercising or intending to exercise their rights over fixtures. It matters little whether the fixtures are originated by the hire-purchase agreement or by some other method. Supposing, for instance, the hirer is the lessee of a house and certain machineries brought in by hire-purchase are affixed at his instance in the house. As between the hirer and the owner of the house, the questions of the hirer's right of removal or the owner's right of retention would be determined by the terms of the lease. Similarly, if the hirer mortgages his own house in which the hired article is annexed, as between the hirer and the mortgagee, their rights will be determined by the laws of the mortgagor and mortgagee. But the question may arise between the owner of the hired article and the owner of the house, in which that is annexed, or the mortgagee of the hirer. If the owner of the house is also made a party to the hire-purchase agreement, the question would be simpler, for, in that case, the owner of the premises being also privy to the contract, it may be contended, that he should be bound by it. But when the owner is not so, and has no notice of the hire-purchase agreement, the question will then be rather complicated. Similarly, the mortgagee of the hirer, stands on his mortgage-bond and thus, has nothing to do with the hire-purchase agreement entered into by his hirer. Now, if the question of right, as between the owner of the hired chattel and the mortgagee, arises, the question will have to be determined according as to whether the mortgage was prior or subsequent to the hire-purchase and as to whether the mortgagee has or has not any notice of the hire-purchase agreement or whether there is any consent of the mortgagee, express or implied, as to the removal of the hired article by its owner.

Let us now consider whether these questions can be decided by the provisions of fixtures as embodied in the Transfer of Property Act.

As between the hirer and the owner of the house, of which the hirer is a lessee, questions of fixtures, arising out of the hire-purchase, will certainly be decided, in the absence of a contract to the contrary, according to the provisions of section 108 of the Transfer of Property Act. Clause (h) of that section, empowers the lessee to remove all sorts of fixtures during the term of his tenancy, provided that such removal does not impair the condition or value of the land. Therefore, under the Indian Law, there is no doubt as to the hirer's rights of removal of articles on hire-purchase during the continuance of his tenancy. Similarly, when the hirer mortgages his own house in which the hired article is fixed, the question of removal would be determined in accordance with the provisions of sections 63 and 70 of the Transfer of Property Act. The hirer, as the mortgagor, will have his fixtures on redemption of the mortgage, as it would not go to the mortgagee, if it is not acquired by him and is not capable of separation, for, if it is capable of separation, it will enure for the benefit of the hirer or the mortgagor.

These questions are, however, confined to the hirer and his landlord or mortgagee. But complications often arise when the hirer indiscriminately mortgages his house including the fixtures, brought in by hire-purchase and subsequently fails to pay up both the mortgage and purchase money. The mortgagee would then want to have the fixtures also, as part of his security and the owner of the fixtures, let on hire, would have it according to the agreement. We have discussed the relative positions of the parties arising

out of this under the English law. Let us see if this question can be decided by the Indian law alone. Section 63 of the Transfer of Property Act provides that the mortgagor would get back, on redemption, the fixtures or accessions, if they are acquired during the continuance of the mortgage. Now, the position of the owner of the hired article is the position of a purchaser or assignee from the mortgagor or hirer. The owner therefore steps into the shoes of the mortgagor or hirer and would have the same rights of removal as the mortgagor could have exercised on redemption. But when the mortgagor fails to redeem the mortgage, the mortgaged property would pass to the mortgagee. What would then be the position of the owner of the hired article? If the hired article is brought in, subsequent to the mortgage, then under Section 70 of the Transfer of Property Act the mortgagee shall be entitled to such accession, in the absence of a contract to the contrary. But he will be entitled to it only for the purpose of his security. It follows, therefore, that if his security is otherwise sufficient, the mortgagee would have no rights to the fixtures. But if his security is proved insufficient and if the hire-purchase agreement is entered into without his knowledge, then certainly, as between the mortgagee and the owner of the hired chattel, the rights of the mortgagee would prevail.

If the hire-purchase agreement is made prior to the mortgage, we have to contemplate a position of which there is no provision in any of the Indian statutes. On general principles, however, it seems that the mortgagee will have no right to restrain the owner of the hiredchattel to remove his fixtures. The Transfer of Property Act defines mortgage as a transfer of an interest in specific immovable

property. [1] Now ,under the hire-purchase agreement, the position of the hirer is no better than that of a bailee. He would have no interest in the hired property, till his rights are perfected by payment of full price. Till then, the absolute ownership rests with the owner of the chattel. Therefore if he mortgages a property over which he has no ownership, it will be a fraudulent transaction and as such void. If it is contended that the hirer mortgages his interest only or his right of enjoyment in the property, subject to the hire-purchase agreement, even then the rights of the owner would remain unaffected. For, in that case, the position of the mortgagee would be rather like the position of a second mortgagee or at any rate, the right of the mortgagee would be subject to the charge namely, the hire-purchase. If the position of the mortgagee as holding a second mortgage is accepted, then he will have to redeem the first mortgage before taking possession, and if it is conceded that the mortgage is subject to the charge, then also the owner will have the rights to remove his fixtures under the charge.

In any view of the matter, it seems that as between the owner of the hired chattel and a subsequent mortgagee, the rights of the owner would prevail, and the mortgagee will have no right to restrain the owner from removing his articles.

We have so far discussed the relative rights of the owner of the hired chattel and the mortgagee of the hirer. Now, let us consider the question arising between the landlord of the hirer and the owner of the hired article. Supposing, for instance, the hirer

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1. Vide Section 58 of the Transfer of Property Act.

is the lessee of a house and attaches in that house some machineries let on hire-purchase. The hirer then fails to pay both the rent of the house and the hire money. What would then be the position of the parties? As between the hirer and his landlord, the law is clear, for under Section 108 clause (h) of the T. P. Act, the hirer as the lessee of the house will be at liberty to remove his fixtures. Now, the question is, whether the same rights can be extended to the owner of the hired article. As has been stated above, the position of the owner of the hired article is like the position of a purchaser or assignee from the hirer, as such, the rights of the owner and the hirer will be co-ordinate, so far as the landlord is concerned. It seems, therefore, that the owner of the hired article, like the lessee of the house, will be at liberty to remove his fixtures at the expiry of the tenancy or within a reasonable time from that date.

If the hire-purchase agreement is, however, entered into after the mortgage or lease, and the mortgagor or the lessor, as the case may be, has no notice of it, although the owner of the hired article has notice of the mortgage or the lease and no consent of the lessor or the mortgagee can be implied, then it seems probable that the owner of the hired-article may have to run the risk of losing his fixtures as against the mortgagor or the lessor, though he may sue the hirer for the price of the hired article.